POPULAR LAW-MAKING

FREDERIC JESUP STIMSON

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A STUDY OF THE ORIGIN, HISTORY, AND PRESENT TENDENCIES OF LAW-MAKING BY STATUTE

BY

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"NOW, MY LORD, I DO THINK, THAT PRACTICE AND USAGE IS A GREAT EVIDENCE OF THE LAW."—CHIEF JUSTICE HOLT, IN "THE GREAT CASE OF MONOPOLIES."—7 STATE TRIALS, 497

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I

THE ENGLISH IDEA OF LAW

My object in the lectures upon which this work is based was to give some notion of the problems of the time (in this country, of course, particularly) which are confronting legislators primarily, political parties in the second place, but finally all good citizens. The treatment was as untechnical as possible. The lectures themselves were for men who meant to go into business, for journalists, or political students; a general view—an elemental, broad general view —of the problems that confront legislation to-day. So is the book not one for lawyers alone; it seeks to cover both what has been accomplished by law-making in the past, and what is now being adopted or even proposed; the history of statutes of legislation by the people as distinct from "judge-made" law; how far legislatures can cure the evils that confront the state or the individual, and what the future of American legislation is likely to be. Constitutional difficulties I had merely mentioned, as there was another course of lectures on American constitutional principles, which supplemented it.[1] In those I tried to show what we *cannot* do by legislation; in these I merely discussed what had been done, and tried to show what we are now doing. What we may *not* do may sound, perhaps, like a narrow field; but the growth of constitutional law in this country is so

[1] "The Law of the Federal and State Constitutions of the United States," Boston Book Company, 1908. "The American Constitution," Scribners, New York, 1907.

wide—in the first place including all the English Constitution, and more than that, so many principles of human liberty that have been adopted into our Constitution, either at the time it was adopted, or which have crept into it through the Fourteenth Amendment, with all the innovations of State constitutions as well—that really the discussion of what *cannot* be done by statute takes one almost over the entire range of constitutional law and even into the discussion of what cannot be done in a free country or under ordinary principles of human liberty.

How many of us have ever formulated in our minds what *law* means? I am inclined to think that the most would give a meaning that was never the meaning of the word *law*, at least until a very few years ago; that is, the meaning which alone is the subject of this book, *statute* law. The notion of law as a *statute*, a thing passed by a legislature, a thing enacted, made new by representative assembly, is perfectly modern, and yet it has so thoroughly taken possession of our minds, and particularly of the American mind (owing to the forty-eight legislatures that we have at work, besides the National Congress, every year, and to the fact that they try to do a great deal to deserve their pay in the way of enacting laws), that statutes have assumed in our minds the main bulk of the concept of law as we formulate it to ourselves. I guess that the ordinary newspaper reader, when he talks about "laws" or reads about "law," thinks of statutes; but that is a perfectly modern concept; and the thing itself, even as we now understand it, is perfectly modern. There were no statutes within the present meaning of the word more than a very few centuries ago. But statutes are precisely the subject of this book; legislation, the tendency of statute-making, the spirit of statutes that we have made, that we are making, and that we are likely to make, or that are now being proposed; so it is concerned, in a sense, with the last and most recent and most ready-made of all legal or political matters. The subject of statute-making is not

thought difficult; it is supposed to be perfectly capable of discussion by any one of our State legislators, with or without legal training; and sometimes with lamentable consequences. For the subject is of the most immense importance, now that the bulk of all our law is, or is supposed to be, statutes.

In order to understand, therefore, what a statute is, and why it has grown important to consider statute-making, it is necessary to have some knowledge of the meaning of the word *law*, and of the origin both of representative government and of legislatures, before we come to statutes, as we understand them; for parliaments existed centuries before they made statutes as we now use this word. *Statutes* with us are recent; *legislatures* making statutes are recent everywhere; legislatures themselves are fairly recent; that is, they date only from the end of the Dark Ages, at least in Anglo-Saxon countries. Representative government itself is supposed, by most scholars, to be the one invention that is peculiar to the Anglo-Saxon people.

And there is another invention—if we can call it one—to my mind of far greater importance, which I should urge was also peculiar to the Anglo-Saxon people; that is, the invention or the idea of personal liberty; which is understood, and always has been understood, by Anglo-Saxons in a sense in which it never existed before, so far as I know, in any people in the history of the world. It is that notion of personal liberty which was the cause of representative government, not representative government that was the cause of personal liberty. In other words, the people did not get up a parliament for the sake of having that parliament enact laws securing personal liberty. It was the result of a condition of personal liberty which prevailed among them and in their laws that resulted in representative government, and in the institution of a legislature, making, as we now would say, the laws; though a thousand years ago they never said that a legislature *made* laws, they only said that it *told what the laws were.* This is another very important distinction.

The "law" of the free Anglo-Saxon people was regarded as a thing existing by itself, like the sunlight, or at least as existing like a universally accepted custom observed by every one. It was five hundred years before the notion crept into the minds, even of the members of the British Parliaments, that they could make a *new* law. What they supposed they did, and what they were understood by the people to do, was merely to *declare* the law, as it was then and as it had been from time immemorial; the notion always being—and the farther back you go and the more simple the people are, the more they have that notion—that their free laws and customs were something which came from the beginning of the world, which they always held, which were immutable, no more to be changed than the forces of nature; and that no parliament, under the free Anglo-Saxon government, or later under the Norman kings, who tried to make them unfree, no king, could ever *make* a law, but could only declare what the law was. The Latin phrase for that distinction is *jus dare*, and *jus dicere*. In early England, in Anglo-Saxon times, the Parliament never did anything but tell what the law was; and, as I said, not only what it was then, but what it had been, as they supposed, for thousands of years before. The notion of a legislature to make *new* laws is an entirely modern conception of Parliament. How did it arise? The English Parliament,[1] as you doubtless know, was the successor, or grew out of the old Witenagemot, the old Saxon Great Council, and that Great Council originally—and I am now talking of centuries before the Conquest—the Witenagemot, included in theory all the free inhabitants of the realm, just as a modern town meeting does. Mind you, they were then tribes, living in "Hundreds." They were not nations, not even states and counties, and in early times it probably was possible to have a popular assembly which should include at least all the warriors, all the fighting men, and consequently

[1] Gneist, "The English Parliament," and Skottowe, "History of Parliament," perhaps best summarize this view.

all the men whose votes counted. No man who could not fight could share in the government—an historical fact which our suffragists tend to ignore when they talk of "rights." The Witenagemot, undoubtedly, was originally a universal assembly of the tribe in question. But as the tribes got amalgamated, were associated together, or at least localized instead of wandering about, and particularly when they got localized in England—where before they had been but a roaming people on account of their struggles with the Britons—the necessity of greater organization probably became obvious to them at once, and the Witenagemot readily assumed a somewhat more formal form; and that resulted in representation. For we are talking of early England; that is, of the eastern half of what is now England, the Saxon part; obviously you couldn't put all the members even of East Anglia in one hall or in one field to discuss laws, so they invented representation. All the authorities appear to be agreed that there is no prototype for what seems to us such a very simple thing as representation, representative government, among the Greeks or the Romans, or any of the older civilizations of which we have knowledge. It is very surprising that it is so, and I am always expecting that some one will discover, either in the Achaian League or somewhere, that it is not so, that there is a prototype; but there doesn't seem to be any regular system of representative government until you get to Anglo-Saxon peoples. So that was the second stage of the Witenagemot, and then it properly begins to be called the Great Assembly or Council of the people. This representative assembly was then not only legislative, it was also executive, to some extent, and entirely judicial; for we are a thousand years before the notion of the threefold division of government has occurred to any one. The early Saxon Witenagemot, as later the Norman kings tried to, did unite all three functions in themselves. Their main function was judicial; for the reason that there was very little notion as yet of *legislation*, in a people or tribe whose simple customs

and simple property demanded very few laws, where the first remedy for any man for any attack on his family or property was the remedy of his own good, right hand. When you really only got into a lawsuit, at least as concerning property, as a result of a killing of somebody or other, albeit in defence of one's own chattels, it is obvious that there need not be much legislation; the laws were too well known, the unwritten law too well enforced. It probably would have surprised the early Englishman if he had been told that either he or anybody else didn't *know* the law—still more that there was ever any need for any parliament or assembly to tell him what it was. They all knew the law, and they all knew that they knew the law, and the law was a thing that they knew as naturally as they knew fishing and hunting. They had grown up into it. It never occurred to them as an outside thing.

So it has been found that where you take children, modern children, at least boys who are sons of educated parents, and put them in large masses by themselves, they will, without apparently any reading, rapidly invent a notion of law; that is, they will invent a certain set of customs which are the same thing to them as law, and which indeed are the same as law. They have tried in Johns Hopkins University experiments among children, to leave them entirely alone, without any instruction, and it is quite singular how soon customs will grow up, and it is also quite singular and a thing that always surprises the socialist and communist, that about the earliest concept at which they *will* arrive is that of private property! They will soon get a notion that one child owns a stick, or toy, or seat, and the others must respect that property. This I merely use as an illustration to show how simple the notion of law was among our ancestors in England fifteen hundred years ago, and how it had grown up with them, of course, from many centuries, but in much the same way that the notion of custom or law grows up among children. The English had acquired naturally, but with the tradition

of centuries, the notion of law a *sexisting;* and that brings us to the next point.

Here again we are so confused with our modern notions of law that it is very important not to be misled by them at the beginning. I am quite sure that all the American people when they think of law in the sense I am now speaking of, even when they are not thinking necessarily of statute law, do mean, nevertheless, a law which is enforced by somebody with power, somebody with a big stick. They mean a law, an ordinance, an order or dictate addressed to them by a sovereign, or by at least a power of some sort; and they mean an ordinance which if they break they are going to suffer for, either in person or in property. In other words, they have a notion of law as a written command addressed by the sovereign to the subject, or at least by one of the departments of government to the citizen. Now, that, I must caution you, is in the first place rather a modern notion of law, quite modern in England; it is really Roman, and wasn't law as it was understood by our Anglo-Saxon ancestors. He didn't think of law as a thing written, addressed to him by the king. Neither did he necessarily think of it as a thing which had any definite punishment attached or any code attached, any *sanction*, as we call it, or thing which enforces the law; a penalty, or fine, or imprisonment. There are just as good "sanctions" for law outside of the sanctions that our people usually think of as there are inside of them; and often very much better. For instance, the sanction of a strong custom. Take any example you like; there are many States where marriage between blacks and whites is not made unlawful, but where practically it is made tremendously unlawful by the force of public opinion. Take the case of debts of honor, so-called, debts of gambling; they are paid far more universally than ordinary commercial debts, even by the same people; but there is no *law* enforcing them—there is no *sanction* for the collection of gambling debts. And take any custom that grows up. We know how

strong our customs in college are. Take the mere custom of a club table; no one dares or ventures to supplant the members at that table. That kind of sanction is just as good a law as a law made by statute and imposing five or ten dollars penalty or a week's imprisonment. And judges or juries recognize those things as laws, just as much as they do statute laws; when all other laws are lacking, our courts will ask what is the "custom of the trade." These be laws; and are often better enforced than the statute law; the rules of the New York Stock Exchange are better enforced than the laws of the State legislature. Now all our early Anglo-Saxon law was law of that kind. And it was not written down for a great many centuries, and even after being first written it wasn't usual to affix any *penalty;* they were mere customs, but of an iron-bound nature—customs that were followed far more devoutly than the masses of our people follow any of our written laws to-day. And their "sanction" was twofold: In the first place, the sanction I have mentioned, universal custom, social ostracism for breach. A second and very obvious sanction, that if you do a thing that I don't like and think is against the law, I am going to knock you down or kill you if I can! That was a sanction, and a perfectly good one; and the question that arose, therefore, was not at all as to penalty for the law-breaker; it was whether there should be a penalty for the law-breaker's being killed. That is the reason they didn't have to have any penalty! In those days if there was a custom that a certain tribe had a certain pasture, and a man of another tribe pastured his cattle in that pasture, the first man would go to him and they would have a fight, and if he killed him he would be, as we say, arrested; then the matter would be inquired into by the kin of the murdered man or neighbors, and if the killer could prove that the murdered man had committed a breach of the law, he went off scot free—so, as a matter of fact he would to-day, if it were justifiable homicide. In other words, it was a question of whether it was justifiable homicide; and that

brought in the question what the law was, and it was usually only in that way. For the law was but universal custom, and that custom had no *sanction;* but for breach of the custom anybody could make personal attack, or combine with his friends to make attack, on the person that committed the breach, and then, when the matter was taken up by the members of both tribes, and finally by the Witenagemot as a judicial court, the question was, what the law was; and if it was proved, for instance, that the law was that there *was* private property in that pasture belonging to the man who committed the murder he went off scot free. That was the working of the old Anglo-Saxon law, and it was a great many centuries before the notion of law changed in their minds from that. And this "unwritten law" perdures in the minds of many of the people to-day.

So it was that the Witenagemot—this Great Council of the realm—was primarily judicial, in the first instance always judicial; that is, it never made new laws. It got together to try people for the breach of law; and that incidentally brought up the validity of the old law, and then decided whether old law was valid or not. In a sense, therefore, you see they told what the law was, they announced it; but they never supposed they were making new laws. That was the last thing they intended to do, and the last thing the people would have stood, had they tried it.

So much for the growth of law, the origin of Anglo-Saxon law, as we understand it, and for representative government, and for the origin of Parliament. I doubt if there was any giving of new law, anything that we should call *legislation*, made by the English Parliament, then called the Witenagemot, before the Norman Conquest. I have never been able to find any. You find occasional announcements that the men of Kent "shall have their liberties as they used to," and perhaps there will be a statement of what those liberties were, in brief; but it is always clearly meant that they are stating the law as already existing. How, then, did they invent a legislature?

The Roman law, the whole Roman system, as you know, was absolutely distinct, and distinct in two great principles which have lasted down really into modern times, and still divide Continental countries from Anglo-Saxon countries. What I call the first great principle is universal law—the principle that no officer of government, no high official, no general, no magistrate, no anybody, can do anything against the law without being just as liable, if he infringed upon a subject's liberty, as the most humble citizen. That is a notion which does not yet exist on the Continent or any part of the world except England and the United States, and the countries or colonies copying after them. In Germany, for instance, Dr. Gierke tells me it exists only partially and by a modern constitution. This is the first great difference; and the second one is the notion that laws are made by the people only, with or without representative government. The notion of law as a custom is Teutonic; but on the Continent the Germans abandoned it. The Roman law was always law more as we moderns think of it; it was an *order*, addressed by the sovereign, or at least by a political superior, to a subject or to a political inferior; addressed in the form of definite writing, that is to say, a statute, and with a sanction, that is to say, a penalty, a threat as to what the sovereign will do if the subject does not obey. That is the universal notion of Roman law, and it has so far affected certain English writers on jurisprudence that I feel almost one should be warned against them. Not that their side isn't arguable, but the weight of English history seems the other way. Austin, for instance, was so much impressed with the notion of law as an order from the sovereign to an inferior that he practically, even when considering the English Constitution, adopts that notion of law, and therefore arrives to some conclusions, as it seems to me, unwarranted, and certainly omits to note a great many things that would be noted had he kept clearly the Anglo-Saxon theory of law in mind.

Now the Normans, mind you, had purely Roman law.

While they were in Normandy, being in France, they had imbibed or adopted Roman notions of law, perhaps because they were then first civilized. They had lost their old Saxon notions, if they had any, for they were, after all, of the same *race* as the Saxons. Nevertheless, when they conquered England they brought just as much the notion of the Roman law into England as if they had been Cæsar's legions. And that fact must always be borne in mind, and that led to centuries of conflict in the making of English constitutional law. The first thing, of course, that they tried to do, that the Norman kings tried to do, was to use law in the Roman way; that is, to make the law themselves, from the king. For that was another consequence of the Roman law, that not only was it an order by the sovereign power, but that this sovereign power was not in theory a legislature, as it is with us to-day, but the sovereign; in France and the Continental countries laws were made in theory and in practice by the king. So the Normans came over with the Roman notion, in the first place, as to what law was, that it was a written, newly made order of a sovereign, not a thing that had grown up and was part of the lives and customs of the people, but a thing made out of hand by the king; and, secondly, that it was made by the king and not by any legislature. And the first two or three centuries of English parliamentary history were mainly taken up, in the English Parliament, so far as it concerns the subject of our course here, in the contest between Parliament and the king as to who should make law and what law was. It took more than one century for the Parliament, after the Norman Conquest, to revive as a Parliament at all; then when it did finally get together it took two or three centuries before it established the principle that it had anything to do with the making of law. The Norman kings regarded the Parliament as a mere method of getting money from the people, hardly even as a Council when they sought for popular support; and yet it was through the fact that they so regarded Parliament that Parliament was enabled ultimately

to acquire the law-making or the legislative power which exists in all our legislatures to-day. The king, in those days, derived his revenue mainly from his own land. It was not necessary for the government to have any revenue except for what we should call the king's private purse. What was wanted for public expense was for two or three well-recognized purposes, all purposes of defence. The old English taxation system was in a sense no system. There wasn't any such thing as taxation. There was the "threefold necessity" as it was called. It was necessary for the king to have money, horses, grain, supplies, etc., to defend the kingdom, and to build forts, and to maintain bridges or defensive works; and that was the only object of taxation in those times. Those were the only "aids"—they were called "aids"—those were the only aids recognized. The first word for tax is an "*aid*," granted voluntarily, in theory at least, by the barons to the king, and for these three purposes only. The king's private purse was easily made up by the enormous land he held himself. Even to-day the crown is probably the largest land-owner in the kingdom, but at the time of the Conquest, and for many years afterward, he certainly owned an hundredfold as much, and that gave him enough revenue for his purse; of course, in those days, money for such things as education, highways, police, etc., was entirely out of their mind. They were not as yet in that state of civilization. So the king got along well enough for his own income with the land he owned himself as proprietor. But very soon after the Norman Conquest the Norman kings began to want more money. Nominally, of course, they always said they wanted it for the defence of the realm. Then they wanted it, very soon, for crusades; lastly, for their own favorites. They spent an enormous amount of money on crusades and in the French wars; later they began to maintain—always abroad—what we should call standing armies, and they needed money for all those purposes. And money could yet be only got from the barons, the nobility, or at least the landed gentry,

because the people, the agricultural laborers or serfs, villeins, owned no land. Knights and barons paid part of the tax by furnishing armed men, but still, as civilization increased, there was a growing demand on the part of the Norman kings for money. Now this money could be got only from the barons, and under the Constitution—and here we first have to use that phrase—it could only be got from the barons by their consent. That is, the great barons of the realm had always given these aids in theory voluntarily. The king got them together, told them what he wanted, and they granted it; but still it had to come from them, and in the desire to get money the Norman kings first called together the Great Council, first consulted the parliament which afterward became their master. They made a legislature by calling them together, although only for this purpose, to give them the power of getting more money; but when the Great Council was once together and the kings began to be more and more grasping in their demands for money, the barons naturally wanted something on their side, and they would say to them: "Well, yes—you shall have this aid—we will vote you this tax—but the men of England must have such and such a law as they used to under Anglo-Saxon times." And they pretty soon got to using the word "people"; the "people" must have "the liberties they had under Edward the Confessor"; and time after time they would wring from a Norman king a charter, or a concession, to either the whole realm or a certain part of the realm, of all the liberties and laws and customs that they had under the old Saxon domination—and that ultimately resulted in bringing the whole free English law back. Thus, early law was custom; Anglo-Saxon law was *free* custom; the English lost it under the Conquest; and they got it back because the first Norman kings had to call the council together, which grew into Parliament, which then, in voting their aids or taxes, demanded their "old liberties"; and finally, after getting Magna Charta, after getting all their old Saxon

liberties back, by easy transition, they began to say: "We would make certain regulations, ordinances, laws of our own"; though we have not yet got to the time where the notion of making *new* law, as a statute is now understood, existed.

II

EARLY ENGLISH LEGISLATION AND MAGNA CHARTA

Parliament began avowedly to make new laws in the thirteenth century; but the number of such laws concerning private relations—private civil law—remained, for centuries, small. You could digest them all into a book of thirty or forty pages. And even to Charles the First all the statutes of the realm fill but five volumes. The legislation under Cromwell was all repealed; but the bulk, both under him and after, was far greater. For legislation seems to be considered a democratic idea; "judge-made law" to be thought aristocratic. And so in our republic; especially as, during the Revolution, the sole power was vested in our legislative bodies, and we tried to cover a still wider field, with democratic legislatures dominated by radicals. Thus at first the American people got the notion of law-making; of the making of new law, by legislatures, frequently elected; and in that most radical period of all, from about 1830 to 1860, the time of "isms" and reforms—full of people who wanted to legislate and make the world good by law, with a chance to work in thirty different States—the result has been that the bulk of legislation in this country, in the first half of the last century, is probably one thousandfold the entire law-making of England for the five centuries preceding. And we have by no means got over it yet; probably the output of legislation in this country to-day is as great as it ever was. If any citizen thinks that anything is wrong, he, or she (as it is almost more likely to be), rushes to some legislature to get

a new law passed. Absolutely different is this idea from the old English notion of law as something already existing. They have forgotten that completely, and have the modern American notion of law, as a ready-made thing, a thing made to-day to meet the emergency of to-morrow. They have gotten over the notion that any parliament, or legislature, or sovereign, should only *sign* the law—and I say sign advisedly because he doesn't enact it, doesn't create it, but signs a written statement of law already existing; all idea that it should be justified by custom, experiment, has been forgotten. And here is the need and the value of this our study; for the changes that are being made by new legislation in this country are probably more important to-day than anything that is being done by the executive or the judiciary—the other two departments of the government.

But before coming down to our great mass of legislation here it will be wise to consider the early English legislation, especially that part which is alive to-day, or which might be alive to-day. I mentioned one moment ago thirty pages as possibly containing the bulk of it. I once attempted to make an abstract of such legislation in early England as is significant to us to-day in this country;[1] not the merely political legislation, for ours is a sociological study. We are concerned with those statutes which affect private citizens, individual rights, men and women in their lives and businesses; not matters of state, of the king and the commons, or the constitution of government. Except incidentally, we shall not go into executive or political questions, but the sociological—I wish there were some simpler word for it—let us say, the *human* legislation; legislation that concerns not the government, the king, or the state, but each man in his relations to every other; that deals with property, marriage, divorce, private rights, labor, the corporations, combinations, trusts, taxation, rates, police power, and the other great questions of the day, and indeed of all time.

[1] See "Federal and State Constitutions," book II, chap. 2.

Had it not been for the Conquest, it would hardly have been necessary to have enacted the legislation of the first two or three centuries at all. Its object mainly was political, that is, to enforce Saxon law from Norman kings. No change was made, nothing new was added. There was, however, a little early Saxon legislation before the Conquest. The best compilation is contained in Stubbs's "Selected Charters." He says that the earliest English written laws contained amendments of older unwritten customs, or qualifications of those customs, when they were gradually wearing out of popular recollection. Such documents are generally obscure. They require for their elucidation a knowledge of the customs they were intended to amend. That is as I told you: everybody was supposed to know the law, and early written statutes were either mere compilations of already existing law, slight modifications of them, or else in the nature of imposing various penalties—all of which assume that you know the law already. When they attempted codification, which they did about twice before the Conquest (especially under Edward the Confessor, for that reason he is called the Father of English law, the English Justinian, because he was enough of a civilian to understand what a code was), King Edward made the attempt to get a certain amount of law written out; but even that would be very unintelligible if you tried to read it, for he assumed that one knew it all already, and it also is mainly in the nature of imposing penalties, not stating the law as it was. However, that is called the first English code. All the Saxon laws Dr. Stubbs could find fill only twenty-two pages of his small book; and he says that English law, from its first to its latest phase, has never possessed an authoritative, constructive, systematic, or approximately exhaustive statement, such as was attempted by the great founders of the civil or Continental law, by Justinian or by Napoleon Bonaparte. Now this is true, even to-day, of our English and our American law. That is, the great bulk of the law that is administered in our courts is not

"written," it is not in any code. There are, of course, text-books on the subject, but they are of no binding authority. It resides in the learning of the judges. It is what is called court-made law—"*jus dicere*," not "*jus dare*." Our judges are still supposed to tell what the law is, and they sometimes, as the common law is a very elastic thing, have to make new law. That is, if the precise case isn't covered by any previous decision or by any statute, the judge or the court will say what the common law ought to be when applied to that state of facts. So our law is a continually growing law, and largely made still in the old Saxon way, by custom and the judges, and still under the theory that the common law is an existing thing; that the law exists and the judge only expounds. We have never lost sight of that theory.

These early Anglo-Saxon laws mostly concern only matters of procedure for the courts, or the scale of punishment. As they assume a knowledge of existing law, they are often hard to understand. Here are some of the laws of Wessex:

A. D. 690. Wessex King Ini.

CAP. 11. "If any one sell his own countryman, bond or free, though he be guilty, over sea, let him pay for him according to his 'wer.'"

As to "wer." Now there were slaves in England in those days; at the time of the Conquest the Domesday Book reports twenty-five thousand. *Slaves*, I mean; not the unfree agricultural laborers, they were in a higher class, but the regularly bound *slaves*, who were descendants, either of the early British inhabitants or of the Saxons themselves, who had been punished in the courts and had been sentenced into slavery, or men who had voluntarily sold themselves into slavery. For under early Saxon law a man could sell his child into slavery if the child were under seven years old, and above fourteen the child could sell himself. This refers, of course, to that; it is really a kind of predecessor of our Thirteenth Amendment; that is, it forbids slavery;

it forbids making new slaves. The word "wer" is the word we have in "wer-wolf," meaning blood; for instance, "weregild" is a man's blood money. Every man had a price from the king down; if a man killed the king he had to pay, we will say, fifty thousand pounds; if a thane, it might be one or two thousand; if an ordinary freeman, one hundred pounds, and so on.

Cap. 36. "Let him who takes a thief, or to whom one taken is given, and he then lets him go, or conceals the theft, pay for the thief according to his 'wer.' If he be an ealdorman, let him forfeit his shire, unless the king is willing to be merciful to him."

Now the earliest direct legislation about personal property in a statute is as late as 1100; but this early Saxon law was a recognition of personal property, because a man cannot steal a thing unless there is property. This section, therefore, implies property in personalty; because a man cannot steal land; but it never occurred to them to pass a law saying that there *shall be* private property, because that was the unwritten law that they were all supposed to know.

A. D. 890. Wessex. Alfred.

Cap. 27. "If a man, kinless of paternal relatives, fight and slay a man, and then if he have maternal relatives, let them pay a third of the 'wer'; his guild-brethren a third part; for a third let him flee. If he have no maternal relatives, let his guild-brethren pay half, for half let him flee."

Cap. 28. "If a man kill a man thus circumstanced, if he have no relatives, let half be paid to the king, half to his guild-brethren."

It is very hard for us to understand what that means. One would infer that the weregild was only paid by a man with relatives on his father's side. It doesn't say that, but that is the inference. We shall have plenty to say about the guilds later—the historical predecessors of the modern trades-unions. We here find the word *guild* recognized and spoken of in the law as early as 890.

A. D. 920. Wessex. Edward.

"2. And if a ceorl throve, so that had fully five hides of his own land, church and kitchen, bell-house and burh-gate-seat, and special duty in the king's hall, then was he thenceforth of thegn-right worthy.

"6. And if a merchant throve, so that he fared thrice over the wide sea by his own means, then was he thenceforth of thegn-right worthy."

Worldly success has thus always been the foundation of English nobility.

Then there is a good deal about how much you have to pay for a churl, and how much for an earl, and so on, leaving out only the slaves; for all the free people of England in Saxon times were divided into earls and churls; that is, noblemen and agricultural laborers or yeomanry; these were the two estates besides the church, always a class by itself. Later there grew up the thanes, who were merely large landlords; the law became that a man that had five hides of land, five or six hundred acres, with a farm, should by the mere fact of having that land become a thane, an earl. That method of ennobling a man by land got to be a way, at that time the only way, by which a churl or a villein could become a nobleman or even be emancipated. Exactly as now with our American Indians; when an Indian gets one hundred and sixty acres given to him in severalty he becomes, under the Dawes Act, a citizen of the United States. Later there grew up emancipation by the guilds. The word *guild* meant the members of a certain handicraft, but that was rather the secondary meaning; it originally meant the freemen of the town. But the freemen of the towns were made up of the freemen of the guilds. No one could become a member of the guild without going through certain ceremonies, much as he would now to join a trades-union; and no one could become a freeman of the town unless he was a freeman of the guild. The law grew to be, however, that if a man succeeded in staying in a town for a year and a day, without being turned out, plying his handicraft, he became by that

mere fact a freeman of the town; for the citizens of towns established their liberty, both personal and political, far earlier than the dwellers on agricultural land.

959–975. Edgar.

CAP. 1. "*Secular Ordinance.* Now this is the secular ordinance which I will that it be held. This, then, is first what I will: that every man be worthy of folk-right, as well poor as rich; and that righteous dooms be judged to him; and let there be such remission in the 'bot' as may be becoming before God and tolerable before the world."

1016. Canute.

CAP. 71. "And if any one depart this life intestate, be it through his neglect, be it through sudden death; then let not the lord draw more from his property than his lawful heriot. And according to his direction, let the property be distributed very justly to the wife and children and relations, to every one according to the degree that belongs to him."

CAP. 81. "And I will that every man be entitled to his hunting in wood and in field, on his own possession. And let every one forego my hunting: take notice where I will have it untrespassed on under penalty of the full 'wite.'"

But even the great code of Edward the Confessor has, for the most part, to do only with political divisions, what shall be a shire, what a parish, etc., and certain technical matters that have now grown obsolete. So we may conclude with the statement, substantially accurate, that there was practically no *new* legislation, no constructive legislation under the Saxons; their social law was all unwritten.

And Parliament did not begin by being a law-making body. Its legislative functions were not very active, as they were confined to declaring what the law was; more important were its executive and judicial functions. In modern English government, particularly in our own, one of the basic principles is that of the three departments, executive, legislative, and judicial; the Norman or Roman theory rather reposed all power in one; that is, in the sovereign, commonly, of course, the king, the others being theoretically his advisers

or servants. In England, to-day, the real sovereign is the Parliament; the merest shadow of sovereignty is left to the executive, the king, and none whatever given the judicial branch. In this country we preserve the three branches distinct, though none, not all three together, are sovereign; it is the people who are that. And each department is of equal dignity; although at one period there was a certain amount of public complaint that Congress was usurping more power than belongs to it, and recently that power was being usurped by the president, there has hardly been (except from Mr. Gompers and Mr. Hearst) any complaint that power is usurped by the *judicial* branch, however unpopular its decisions. But in England there is no pretence of maintaining the three branches uniform either in importance or in power. Starting with the Great Council, which had originally only a certain amount of executive power and a great deal of judicial power, they have retained and added to the former, while practically giving up the latter; and, moreover, they have divided into the two houses, the House of Lords and the House of Commons, with a division of sovereignty between them, the Commons, of course, getting the lion's share. The only judicial power substantially now remaining in the English Parliament is the power of impeachment, which is rarely exercised in England, and the appellate jurisdiction of the House of Lords, of the "law" lords, that is, those peers who held legal offices. On the other hand the legislative function of Parliament, which began merely in the way of saying what the law was, has enormously developed, and still more so the executive. Thus the legislative branch of the three divisions in the English government has increased out of all proportion to both the others, having now all the legislative power and most of the executive. And legislatively it is omnipotent; it is confined by no constitution; even the king cannot withhold his consent. Parliament can make any law, although against what *was* the Constitution; the Constitution

may be modified by a simple statute. So their legislative function is infinite; and their executive function has, in substance, grown very large, because the British government is carried on by the cabinet, which is practically a committee of the House of Commons. But of the judicial function, which was the principal function of the Great Council at the time of the Conquest, hardly a shred remains. It is the history of all countries that people are not jealous of the judicial power, while they are extremely anxious to seize the legislative and executive. With us, however, we are supposed to have all three functions co-ordinate and in good working activity. But in both countries, money bills, bills imposing taxes, are the function of the lower house. That principle grew historically from the principle that all taxation must be voted by the people, directly or indirectly; must be with the common consent and for the common benefit. That principle was established by the House of Commons, and consequently they arrogated to themselves that part of the legislative power. That principle we have retained in our Federal Constitution, and in most of our State constitutions; all of which have the double house.

The first functions of Parliament were restricted to voting taxes. The king called the barons together merely to get "aids," and they wouldn't give them until he recognized what they chose to call the old law of England, always a pre-existing law. It was still a long time before there was constructive legislation. Just as, before the Conquest, in the seventh century, we find it said of the law of Wihtred: "Then the great lords with the consent of all came to a resolution upon these ordinances and added them to the customary laws of the men of Kent"; and, in the time of King Alfred: "I, then, Alfred, king, gathered these [laws] together, and commanded many of those to be written which our forefathers held, those which to me seemed good; and many of those which seemed to me not good I rejected them, by the counsel of my 'witan,' and they then said that it

seemed good to them all to be holden";[1] so, after the Conquest, every Norman king was made on his coronation oath to promise this, the law of Edward the Confessor, until Magna Charta; after that they promised to respect Magna Charta instead, which was thus reissued or confirmed thirty-two times in the eighty-two years which intervened between Runnymede and the final Confirmation of Charters under Edward I. Thus, William the Conqueror himself, in his charter to the city of London, says, in Anglo-Saxon: "*And I do you to wit that I will that ye two be worthy of all the laws that ye were worthy of in King Edward's day.*" So the Domesday Book records "*the customs*," that is to say, the laws, of various towns and counties; these bodies of customs invariably containing a mere list of penalties for the breach of the established law; while later charters usually give the inhabitants of a town all the customs and free privileges enjoyed by the citizens of London.

But after the Conquest laws could only be enacted with the concurrence of the king; and the phrase was, and is still, in form, that "the king wills it"—*Le Roy le veult.* Nevertheless, Parliament usually originated laws. The early Norman kings cared nothing about legislation; their sole desire was to get money from the people. For two centuries, therefore, Parliament was occupied only with laws recognizing the old Anglo-Saxon laws previously existing, or laws removing abuses of the royal power; and the desire of the king to tax the people was used as the lever to get him to assent to these laws.

With the usual sensible indifference of the English race to mere matters of form, they allowed the Norman kings to go on declaring the laws and signing them as if they were made only by the crown, which was the Norman theory—not caring for the shadow, if they could get the substance. Thus they established, in the first two or three centuries, the right to force legislation on the king, and they did it by the instru-

[1] Stubbs's "Charters," p. 62.

ment of the taxation power. For taxation must be "by the common consent of the realm"; no taxation without representation, as the Declaration of Independence puts it, is probably the earliest principle of the English Constitution; and it is most significant to the student of the constitutional law, a most necessary reminder to those who do not value our Constitution, that it was the departure by George III from this very earliest of English constitutional principles that caused the loss of his American empire.

This was six hundred years old, therefore, at the time of our Revolution. Except those two principles, taxation by common consent and taxation for the common benefit—which latter was not finally established until two hundred years later (that is, it was put in the first Magna Charta, John's, and then quietly dropped out by Henry II, and kept out of the charter for nearly one hundred years),—we have to come down to the year 1100 before we find the first *sociological* statute. "Henry I called another convention of all the estates of the realm to sit in his royal palace at London . . . the prohibiting the priests the use of their wives and concubines was considered, and the bishops and clergy granted to the king the correction of them for that offence; by which means he raised vast sums of money compounding with the priests. . . ."[1]

In 1 Henry, cap. VII, is another recognition of personal property—it says that at a man's death it is to be divided between his widow and his heirs. Now that may seem commonplace enough; but it is interesting to note, as in the law, personal property did not come first; property in land was many centuries earlier. And this suggests the legal basis and present tendency of the law of property. "Property exists only by the law"; and extreme socialists say that all private property is robbery. No law, no property; this is true. Property is an artificial thing. It is a creation of law. In other words, where there is now no law except statute, it is the creation of statute. That may

[1] Cobbett's "Parliamentary History of England," I, 4.

sound a commonplace, but is not, when you remember that socialists, who are attacking property, do so on precisely that ground. They say it is a fictitious thing, it is a matter of expediency, it is a matter which we can recognize or not, as we like; "no law, no property," and they ask us to consider whether, on the whole, it is a good thing to have any property at all, or whether the state had not better own all the property. But our Federal and State constitutions guard it expressly.

Thus, property is the very earliest legal concept expressed in statutes, just as it is perhaps the earliest notion that gets into a child's mind. And ownership of land preceded *personal* property—for the perfectly simple reason that there was very little personal property until comparatively late in civilization, and for the other more significant reason that an Anglo-Saxon freeman didn't bother with law when he had his good right hand. In the fifth, sixth, and seventh centuries, when we were barbarous tribes, a man's personal property consisted chiefly in his spear, his weapons, or his clothes; enemies were not very apt to take them, and if they did, he was prepared to defend them. Then, cattle, in those days, belonged to the tribe and not to the individual. So, I should fancy, of ships—that is, galleys, not private "coracles," the earliest British boats. Consequently there wasn't any need for a law as to personal property. What little there was could be easily defended. But with land it was different. Property in land was recognized both among the English and, of course, with the Normans; and in ways so similar that it was very easy for the Normans to impose the feudal system upon England. There had been no feudal system before the Norman Conquest; there were then three kinds of land: the rare and exceptional *individual* land, owned by one man —always a freeman, not a villein or slave—and this was very small in extent, limited to a very few acres around a man's home. Most of the land was held in common; the folc land, so-called, which belonged to the tribe; the land on which the cows of the village were pastured. And finally

there was the public, or unappropriated, or waste land. Most of this last was seized, after the Conquest, by the big feudal lords. For they came in with their feudal system; and the feudal system recognized no absolute ownership in individuals. Under it there were also three kinds of land, and much the same as the Saxon, only the names were different: there was the crown land—now I am speaking English and not Norman-French—which belonged to the king and which he probably let out most profitably; there was the manor, or the feudal land, which was owned by the great lords, and was not let by the king directly; and then there was the vacant land, the waste land, which was in a sense unappropriated. Now all the Norman kings had to do was to bring the feudal system over the Saxon law of land, so that the tribal land remained the only private land—that which is called "boke land." This is land such as all our land is to-day, except land like our Cambridge Common. With a very few exceptions, all our land is "boke" land—freehold land. Then there was the public land; but that very soon was taken by the lords and let out to their inferiors; this was the great bulk of land in England after the Norman Conquest. Lastly again there was the crown land, out of which the king got his revenue. As something like this threefold system of land existed before the Conquest, a subtle change to the feudal system was comparatively easy by a mere change of name.

In the same year—1100—is the Charter of "Liberties" of Henry I. It restores the laws of Edward the Confessor "with the amendments made by my father with the counsel of his barons." It promises in the first section relief to the kingdom of England from all the evil customs whereby it had lately been oppressed, and finally returns to the people the laws of Edward the Confessor, "with such emendations as my father made with the consent of his barons." [1] In his charter to the citizens of London [2] he promises general free-

[1] Stubbs's "Charters," p. 101 (clause 13). [2] *Ibid.*, p. 108.

dom from feudal taxes and impositions, from dane-geld and from the fine for the murder of a Norman; and the Charter of Liberties issued by Henry II in 1154 confirms their "liberties and free customs to all men in the kingdom." [1] From this dates the equality of Englishmen before the law, commons as well as barons. Henry II was the first Norman king who had the old Saxon blood, and therefore he was looked forward to with a great deal of enthusiasm by the people of England. For although it is only one hundred years after the Conquest, the Normans and the Saxons had pretty well fused, and the Normans, who were inferior in number, had got thoroughly imbued with the free notion of Anglo-Saxon law. So they got this charter from him; but there is no legislation to concern us in it, it is only political. It has a great deal to do with the church, and with what the king will not do; it binds him, but it does not state any law directly.

There is further a continued evidence of the efforts of the people to restore the common law of England as against the king's law or Roman law, or later against the law of the church, also a kind of Roman law known as canon law; and later still against the law of the king's chancellor, what we should now call chancery jurisdiction; for the jealousy of chancery procedure was quite as great in the twelfth century as it is with the most radical labor leaders to-day; but of this later on.

In 1159 they succeeded in doing away with the Norman method of trying cases by battle and the Saxon method of trying by oath, and by the machinery of the Norman Great Assize introduced again trial by jury. For this in itself is probably an old Saxon institution. And in 1164 came the great Constitutions of Clarendon, the principal object of which was to free the people from the church law and subject the priests to the ordinary common law as in times before the Conquest—for now, "as the influence of the Italian law-

[1] *Ibid.*, p. 135.

yers increased," [1] all the priests and clergy were above it. It was the first great statute which clearly subjected the church—which, of course, was the Church of Rome—to the common secular law. There was a vast jurisdiction of church law ("Doctors commons" courts lasted until a generation ago in England); some of it still remains. But in these early days all matters concerning marriage, divorce, guardianship of children, ownership of property after death, belonged to church law. It is hard to see why, except that the mediæval church arrogated to itself anything that concerned *sin* in any way—anything that concerned the relation of the sexes, that concerned the Holy Sacraments, and marriage is a sacrament. Consequently the mediæval church claimed that it had jurisdiction over all marriage, and over all divorce; and also took jurisdiction over a man's children at his death, and over his property, now exercised by our courts of probate. This they got out of the notion that when a man was dead, there was something, in a sense, that went beyond this life in looking after his property and children. And down until twenty or thirty years ago all jurisdiction in England in matters which concerned a man's property, after death, belonged to the church courts and their successors. The church law was based on the Roman law, but was called *canon* law, the technical word, because it is the "canons" of the church. It is a convenient term to distinguish it from the ordinary civil law of the Continent. So that the Constitutions of Clarendon began what was completed only under Henry VIII; they very clearly asserted the claim of the king to be supreme over the Church of England. The Bishop of Rome, as Henry VIII called the pope, had no more power than any other foreign bishop.[2] There still remained the institution known as benefit of clergy, by which any priest, or later any clerk or cleric (which word came to mean any one who could read and

[1] Stubbs, p. 136.
[2] Yet "Peter's Pence" were initiated by Ini, King of the West Saxons, about 690!

write) could get off of any criminal accusation, at first even murder, by simply pleading his clergy; in which case the worst that could happen to him was that he was branded in the right hand. But the Constitutions of Clarendon were a great step toward civil liberty. Taken by us in 1164, it was followed in so neighboring a country as France only so late as a few years ago. The priests, however, still managed to retain their jurisdiction over offences among themselves, as well as over marriage, the relation between the sexes, slander, usury, and wills—of matters relating to the sacraments, and of sins.

Now this is a very interesting matter, and were it borne in mind by our modern legislators they would escape a good deal of unintelligent legislation; that is, the distinction between a sin and a crime. A sin is against the church, or against one's conscience; matter, therefore, for the priest, or one's spiritual adviser. A crime is an offence against other men; that is, against the state, in which all are concerned. Under the intelligent legislation of the twelfth century all matters which were *sins*, which concerned the conscience, were left to the church to prevent or punish. For the same reason usury was matter for the priest—because it was regarded under the doctrines of the Bible as a sin. This notion prevailed down to the early legislation of the colony of Massachusetts, though doubtless many things which were then considered sins would now be regarded as crimes, such as bigamy, for instance. The distinction is, nevertheless, a valid one, and we shall have occasion frequently to refer to it. We shall find that the defect of much of our modern legislation—prohibition laws, for instance—is that they attempt to treat as crimes, as offences against the state, matters which are merely sins, offences against the conscience or the individual who commits them.

To-day, the American constitutions all say that a militia is the natural defence of a state of free men. It is interesting, therefore, to find, hardly a century after the Norman

Conquest, in 1181, the Assize of Arms, which revived the ancient Saxon "Fyrd," the word for what we now call militia; and, twenty years before that, "scutage" replaced military service. To the burdens of the feudal system, compulsory military service and standing armies, our ancestors objected from the very beginning. In a sense, scutage was the beginning of taxation; but it was only a commutation for military service, much as a man to-day might pay a substitute to go to war in times of draft. General taxation first appears in 1188 in the famous Saladin tithe, the first historical instance of the taxation of personal property as distinct from a feudal burden laid upon land. The object of this tax was to raise money for the crusade against the Sultan Saladin. It was followed, five years later, by a tax of one-fourth of every person's revenue or goods to ransom the king, Richard I having gone to this crusade against Saladin, and been captured on his return by his good friend and Christian ally, the Emperor of the Holy Roman Empire. It is interesting to note that the worth of the king in those days was considered exactly one-fourth of the common wealth of England. John was less expensive; but he was not captured. He levied a tax ten years later of one-seventh part on the barons, and one-thirteenth on every man.

In 1213 two important things happened. The high-water mark of domination by the Roman Church is reached when King John surrendered England to the pope, and took it back as a fief of the pope for a tribute of one thousand marks. The same year the other early method of trial of lawsuits was abolished by the Lateran Council—trial by ordeal. This was the only remaining Saxon method. The Norman trial by battle had already been superseded by trial by jury; and from this time on, in practice, no other method than a jury remains, though trial by battle was not abolished by statute until the nineteenth century.

And then we come to Magna Charta. The first time it was granted was in 1215 by John, but the charter always

quoted is that promulgated ten years later under Henry III. They were very nearly identical, but the important omission in the charter of Henry was in regard to "scutage" ("no aid other than the three customary feudal aids shall be imposed without the common counsel of the kingdom"); that, of course, is the principle we have discussed above, first put in writing in the charter of John. The barons claimed it as part of the unwritten law. But Henry III in his charter cannily dropped it out—which is a trick still played by legislatures to-day. This Magna Charta was confirmed and ratified something like thirty times between the time of its adoption under John and the time it got established so completely that it wasn't necessary to ratify it any more. There are four sections of Magna Charta that are most important. Chapter 7, the establishment of the widow's dower; of no great importance to us except as showing how early the English law protected married women in their property rights. Chapter 13 confirmed the liberties and customs of London and other cities and seaports—which is interesting as showing how early the notion of free trade prevailed among our ancestors. It gave rise to an immense deal of commercial law, which has always existed independent of any act of Parliament. Chapter 17 provided that the common pleas court—that is, the ordinary trial court—should not follow the king about, but be held at a place and time certain. That was the beginning of our legal liberty; because before that the king used to travel about his realm with his justiciar, as they called his chief legal officer, and anybody who wanted to have a lawsuit had to travel around England and get the king to hear his case. But the uncertainty of such a thing made justice very difficult, so it was a great step when the leading court of the kingdom was to be held in a place certain, which was at once established in Westminster. Minor courts were, of course, later established in various counties, though usually the old Saxon county or hundred-motes continued to exist. Chapter 12 is the one relating to scutage, from the

word *scutum*, shield—meaning the service of armed men. Just as, to-day, a man who does not pay his taxes can in some States work them out on the road, so conversely in England they very early commuted the necessity of a knight or land-owner furnishing so many armed men into a money payment. "The three customary feudal aids" were for the defence of the kingdom, the building of forts, and the building of bridges —all the taxes usually imposed upon English citizens in these earliest times—all other taxation to be only by the Common Council of the kingdom. This is the first word, council; later, it became "consent"; the word *conseil* meaning both consent and council. "Council of England" means, of course, the Great Council. We are still before the time when the word Parliament was used. Thus Magna Charta expresses it that there should be no taxation without "the advice" of Parliament, without legislation; and as Parliament was a representative body, it is the equivalent of "taxation without representation." This also was omitted in Henry III's charter, 1217, and only restored under Edward I in 1297, a most significant omission. And it is also expressed in early republications of the Great Charter that taxation must be for the benefit of *all*, "for public purposes only," for the people and not for a class. On this latter principle of Anglo-American constitutional law one of our great political parties bases its objection to the protective tariff, or to bounties; as, for instance, to the sugar manufacturers; or other modern devices for extorting wealth from all the people and giving it to the few. All taxation shall be for the *common* benefit. Any taxation imposed for the sole benefit of the land-owning class, for instance, or even for the manufacturing class, is against the original principles of constitutional liberty.

Then we come to chapter 39, the great "Liberty" statute. "No freeman shall be taken or imprisoned or be disseised of his freehold or *his liberties or his free customs* [these important words added in 1217] or be outlawed or exiled or

otherwise destroyed but by lawful judgment of his peers, or by the law of the land." This, the right to law, is the corner-stone of personal liberty. Any government in any country on the Continent can seize a man and keep him as long as it likes; it is only Anglo-Saxons that have an absolute right not to have that happen to them, and not only are they entitled not to be imprisoned, but their liberty of free locomotion may not be impeded. An American citizen has a constitutional right to travel freely through the whole republic and also not to be excluded therefrom. Punishment by banishment beyond the four seas was forbidden in very early times in England. "Disseised of his freehold, of his liberties or his free customs"—that is the basis of all our modern law of freedom of trade, against restraint of trade, and the basis on which our actions against the modern trusts rest; the right to freely engage in any business, to be protected against monopoly either of the state or brought about by competitors, to freely make one's own contracts, for labor or property, to work as long as one chooses, for what wages one wills, and all the other liberties of labor and trade. "Or be outlawed or exiled or otherwise destroyed"—that is a broad general phrase for any interference with a man's property, life, or liberty. "Nor will we go upon him"—that has been translated in various ways, but it means what it says; it means that the king won't descend upon a man personally or with his army; nor will we "send upon him"—a law officer after him; "but by the lawful judgment of his peers, or by the law of the land"—that means jury trial, or at least the law of the land, as it then was; and that phrase, or its later equivalent—due process of law—is discussed to-day probably in one case out of every ten that arise in our highest courts. Many books have been written upon it. To start with, it means that none of these things can be done except *under law;* that is, except under a lawsuit; except under a process in a court, having jury trial if it be a civil case, and also an indictment if it be a criminal case, with all the

rights and consequences that attend a regularly conducted lawsuit. It must be done by the courts, and not by the executive, not by the mere will of the king; and, still more important to us to-day, not by legislatures, not even by Parliament. "We will sell to no man, we will deny or delay to no man, either right or justice," needs no explanation; it is equality before the law, repeated in our own Fourteenth Amendment.

Lastly, we have in cap. 41: "Merchants shall have safe conduct in England, subject only to the ancient and allowed customs, not to evil tolls"—a forecast of the allowable tariff as well as of the spirit of modern international law. Finally, there is a chapter on mortmain, recognizing that land might not be given to monasteries or religious houses, and particularly under a secret trust; the object being to keep the land, which made the power of the realm, out of the hands of the church. As far as that part of it goes, it is merely historical to us, but it developed into the principle that corporations "which have no souls," and do not die, should not own too much land, or have too much power—and that is a very live question in the United States to-day.

One must not be misled by the generality of the phrase used in chapter 39, and think it unimportant because it looks simple. It is hard for an American or Englishman to get a fresh mind on these matters. We all grow up with the notion that nobody has the right to arrest us, nobody has the right to deprive us of our liberty, even for an hour. If anybody, be he President of the United States or be he a police officer, chooses to lay his hand on our shoulder or attempts to confine us, we have the same right to try him, if he makes a mistake, as if he were a mere trespasser; and that applies just as much to the highest authority, to the president, to the general of the army, to the governor, as it does to a tramp. But one cannot be too often reminded that this principle is peculiar to English and American civilization. Throughout the Continent any official, any judge,

anybody "who has a red band around his cap," who, in any indirect way, represents the state—a railway conductor, a spy, a station agent—not only has the right to deprive you of your freedom, but you have no right to question him; the "red band around the cap" is a final answer. Hence that extraordinary incident, at which all England laughed, the Kupenick robbery. A certain crook who had been a soldier and was familiar with the drill and the passwords, obtained possession of an old captain's uniform, walked into a provincial town of some importance, ordered the first company of soldiers he met to follow him, and then with that retinue, appeared before the town hall and demanded of the mayor the keys of the treasury. These were surrendered without question and he escaped with the money, representing, of course, that he had orders from the Imperial government. It never occurred to any one to question a soldier in full uniform, and it was only some days later, when the town accounts were sent to Berlin to be approved, that the robbery was discovered.

Such a thing could by no possibility have happened in England or with us; the town treasurer would at once have demanded his authority, his order from the civil authorities; the uniform would have failed to impress him. Moreover, under our local self-government, under our decentralized system, nobody is *above* even a town officer, or a State or city official at the head of his department, however small it be, except the courts. State officers may not command town officers, nor Federal officers State officers; nor soldiers give orders to policemen. The president, the governor, may perhaps remove them; but that is all. And even the policeman acts at his peril, and may be sued in the ordinary courts, if he oversteps his authority. The notion that a free citizen has a right absolutely to question his constraint by any State officer is peculiar to the English and American people, and this cannot be too often repeated; for it is what foreigners simply fail to understand. And it rests on this chapter in

the Great Charter, originally, as amplified and explained by the courts and later acts of Parliament, such as the Habeas Corpus Act. If a man is arrested by any official, that person, however great, has to justify the arrest. In theory, a man arrested has a right to sue him for damages, and to sue him criminally for trespass; and if that man, be he private individual or be he an official or president, cannot show by a "due course of law"—that is, by a due lawsuit, tried with a jury—that he did it under a duly enacted law, and that the facts of the case were such as to place the man under that law—then that official, however high, is just as much liable in the ordinary courts, as if he were the merest footpad trying to stop a man on the highway—a doctrine almost unknown to any country in the world outside of England, the United States, and English colonies.

III

RE-ESTABLISHMENT OF ANGLO-SAXON LAW

Going on with the statutes, the next thing we will note is a matter that concerns the personal relations. It shows again how eagerly our English common law overruled the church law, the canon law. Although the church under the pope always pretended that it alone had authority to regulate relations between the sexes, marriage and divorce, we found Henry I interfering with the priests themselves, and we now find as early as 1235, a secular statute which extends the interference of the secular law over the relations between parent and child; that is, as to when a child should be legitimate and when not. We shall have a great deal to say later about marriage and divorce laws, particularly divorce laws as they exist in this country and as they apparently are going to be. As early as 1235 the secular courts interfered with the marriage relation; and the importance of that is here: there is one great school to-day, including largely clergymen and the divorce reformers, so-called, who hold substantially that marriage is a sacrament, or at least a status; that the secular law has nothing to do with it and should not be allowed to grant a divorce except for canonical causes, *i. e.*, causes recognized by the church; that it is not like any other contract, which can be set aside with mutual consent; when a marriage takes place, they say, it is a sacrament, or, at least, a status ensues which cannot in future be altered. Consequently, it is not like a contract; for all contracts can be abrogated by mutual consent. On the other hand, the most radical people go to the other extreme, and say that mar-

riage *is* like any other contract; it is purely a civil contract, not a sacrament, not a status; just like any other, and some of them go to what is the logical conclusion of that position and say that therefore marriage, like any other contract, ought to be ended at any time by the consent of both parties. The extreme radical view leads to the conclusion that a man and woman ought to be divorced any time by merely saying that they want to be; and some States have almost got to this position in their statutes. This may seem a very far cry from this early statute, which does not directly concern marriage but the status of children; nevertheless it has this bearing—it is an interference by Parliament, by the secular, legislative branch of government, with a relation which the church believed to belong only to the church. It so happens that in this instance the secular law instead of being liberal and kindly was extremely cruel and the reverse of liberal. Under the church law, when a man married a woman by whom he already had children, all those children were thereby made legitimate, and that certainly seems the kindly and the Christian law. But the secular barons who constituted the Parliament, in their jealousy for the common law, took the harsher view, that any children born of parents who are not married at the time they are born shall be illegitimate, although their parents may marry afterward. Beaumont and Fletcher, in one of their plays, make a punning reference to that. It seems to have struck Beaumont and Fletcher as it does us, that it was a cruel law for the Parliament to make; when the church for once was liberal, it was queer that the Parliament should be illiberal; so Beaumont and Fletcher, in one of their plays, say: "The children thou shalt get *by this civilian* cannot inherit by the *law*." This is interesting, because they use all the words I have been trying to define; when they say "the children thou shalt get by this *civilian*," they mean by this civilian a person who is under the civil, or Roman, or church law; that is, they mean to say, although you marry a woman

who is a church member and under the jurisdiction of the bishop, etc., nevertheless the church law won't help you; your children by her cannot inherit by the *law*, and the law as used by Beaumont and Fletcher and as used by me and as used in English books means the *common* law, the common *secular* law, the law of *England*, not the civil or canon law.[1] Beaumont and Fletcher evidently thought it was a very illiberal statute; and our modern American States have all come to Beaumont and Fletcher's conclusion; they have universally reversed the old English statute and gone back to the church law, so that throughout the United States to-day a child born before the marriage of its parents is legitimate if its parents afterward marry. That is true, no matter how late it is; if the man marries her even on his death-bed, all his children are legitimized.

In the same Statute of Merton there is a sentence against usury, "no usury permitted against minors"; and there are two things to note here. One is, that the secular legislature is also taking jurisdiction of minors, who were claimed at that time to be solely under the jurisdiction of the church; and the other is the reference to usury. Mind you, usury is interest. It didn't mean excessive interest, as it does now. As you probably know, the notion prevailed in the early Middle Ages that all usury—interest—was a sin and wrong; and even Ruskin has chapter after chapter arguing that principle, that it is wrong to take interest for money. I should perhaps add another reason why interest was so disliked in early England: There was very little money in early England; and it mostly belonged to the Jews. It was a good deal as it is in Russia to-day; the Jews were persecuted in Russia as in early England, because, in the country districts of Russia, the Jews have all the money, and money-lenders are always unpopular. So in early England. The great barons had their land and their cattle and crops, but they

[1] "And so all the earls and barons answered with one voice, that they would not change the laws of England."

had little money. When they wanted money they got the value of it out of their tenants. Nobody carried large sums of money around with him then, any more than a woman does to-day—she relies on her husband or father; they went to the nearest Jew. When the king wanted cash, he also extorted it from the Jews. One of the early Henrys said seriously, that he regarded the Jews as a very convenient sponge! That is, they sucked all the money in the kingdom and got it into a place whence he could easily get it out. But it made the Jews very unpopular with the masses of the people and with the Parliament; hence, their great dislike of usury. I doubt very much if they would have cared much about usury if one gentleman had been in the habit of loaning money to another; but all the money came from the Jews, who were very unpopular; and the statutes against usury were really made against them, and that is why it was so easy to pass them—they based it, doubtless, on the references to usury in the Bible. Thus they got the notion that it was wrong to charge interest, or at least extortionate interest; more than a certain definite per cent.; and this is the origin of all our interest and usury statutes to-day. Although most economists will tell you that it is ridiculous to have any limit on the rate of interest, that the loan of money may well be worth only four per cent. to one man and twenty-five to another, and that the best way for everybody would be to leave it alone; nevertheless, nearly all our States have usury laws. We shall discuss that later; but here is the first statute on the subject, and it really arose because of the feeling against the Jews. To show how strong that prejudice was, there was another statute passed in the interest of liberality to protect the Jews—a statute which provided liberally that you must not take from a Jew "more than one-half his substance." And a very early commentator tells us of a Jew who fell into a privy on a Friday, but refused to be helped out on Saturday because it was his Sunday; and on Sunday he besought the Earl of Gloucester to pull him out, but the

Earl of Gloucester refused because it was his Sunday; so the Jew remained there until Monday morning, when he was found dead. There is no prejudice against Hebrews to-day anywhere in Europe stronger than existed even in England for the first three or four centuries after the Norman Conquest; and had it not been for the protection given them by the crown, probably they would have been exterminated or starved out, and in 1289 they were all banished to the number of 16,160, and their movables seized.

In 1264 citizens of towns were first represented in the Parliament (in the Great Council, that is, for the word parliament is not yet used), originally only composed of the great barons, who were the only land-owners. The notion of there being freemen in towns was slowly established, but it was fully recognized by 1264, and in that year citizens of towns first appeared in the Council. To-day, under the various Reform Acts, tenants or even lodgers in towns are just as much represented as the land-owners; but the reform which began in 1264 took six hundred years to be thoroughly established.

And now we find the first statutory origin of that utterly fallacious principle—although alive to-day—that the state, in a free country, a legislature-governed country, has the right, when expedient, to fix the *price* of anything, wages or other commodities; fallacious, I say, except possibly as to the charges of corporations, which are given special privileges by the government; the principle, which prevailed throughout the Middle Ages, of fixing the prices of all things. In this case the price was on bread; but you find now for many centuries an attempt to fix the price of almost everything; and of labor, too, what wages a man should be paid. It lasted persistently for centuries and centuries, and it was only under the influence of modern political economy, Adam Smith and other quite modern writers, that the principle that it was possible to fix prices of commodities was utterly eradicated from the English mind. And you hardly got it out

of England before it reappeared in the United States. It is not a new-fangled principle. You find the newspapers commonly talk about fixing prices by law as if it were something utterly unheard of and utterly new. It is not so. It is on the contrary as old as almost any legislation we have, and you can make no argument against it on that ground. It has always been the custom of our ancestors to regulate the prices of wages by law, and the notion that it was either unconstitutional or inexpedient dates from a very few years back; yet all such attempts at legislation have utterly disappeared from any modern statute-book. In no State of our forty-six States is any one so unintelligent, even in introducing bills in the legislature, as to-day to propose that the price of a ton of coal or a loaf of bread shall be so much. Nor is any modern legislature so unintelligent or so oppressive as to propose sumptuary laws; that is, to prescribe how expensively a man or woman must dress; but in the mediæval times those were thought very important. Every class in England was then required by law to have exactly so many coats, to spend so much money on their dress, so much on their wives' dress, and certain men could have fine cloth and others coarse cloth; everything was graded, even to the number of buttons on clothes, and they went so far even as to try in some early legislation to say what men should have to eat; the number of courses a man should have for his dinner were prescribed by law at one time in England, varying according to the man's rank. All such legislation has absolutely vanished and probably no one need know that it existed—but that when efforts are made, as they sometimes are, by our more or less uneducated members of legislatures to introduce bills of such a kind, it is very important for us to know that those experiments have been tried and have failed, having proved to be either impracticable or oppressive or not for the general benefit. This is the importance of these early laws, even when obsolete; because we never know when some agitator may not pop up

with some new proposal—something he thinks new—which he thinks, if adopted, will revolutionize society. If you can show him that his new discovery is not only not new, but was tried, and tried in vain, during two or three centuries in the life of our own ancestors, until an enraged public abolished it, it will destroy any effect that he is likely to make upon the average legislature.

The first general example of an English law fixing the price of a commodity is in 1266, the Assize of Bread and Beer. That fixed the price of bread according to the cost of wheat, a sliding scale, in other words; when a bushel of wheat cost so much, a loaf weighing a certain amount must cost so much, etc. But you must not confound that with the modern law that still exists in England, and in some States and cities here, merely regulating the *size* of a loaf. That is perfectly proper, reasonable legislation, done merely for the purpose of protecting the public and preventing fraud. In England, for instance, there is a certain standard loaf known as a quartern loaf, and in order to prevent poor people being cheated it is prescribed by city ordinance that the quartern loaf shall weigh so much, shall contain so many ounces of flour. We do have similar laws saying how much a bushel of potatoes shall weigh, how much a barrel of flour shall weigh. That isn't fixing the price; it is only fixing a uniform size so that the public may not be cheated in its dealings, and one must not take such a law as justifying the fixing of prices.

In the year 1266 I find the first statute in the French language, Norman French; before that they were all in Latin; and they lasted in French for some four or five hundred years, and then they were put in English. The Statute of Marlborough, 1267, is a very important one historically, but it does not concern us, because it mainly had to do with the ownership of land, the tenure of land in England, an extremely important subject, but one that is obsolete here. Then we have something about the trial of clerks for murder.

Of course the word clerk there means not what we mean by a clerk, but a person who could read and write; and nothing more than that. It originally meant persons in holy orders, who were called clerks (clerics), but there got to be clerks who were not in holy orders. Originally only priests could read and write. No one else knew how, except possibly great personages like kings, and consequently it was the same thing whether, when you said a clerk, you meant a person who could read and write or a priest. But when there got to be people who could read and write and who were not priests, it became an important distinction. There was a privilege in England known as the "benefit of the clergy"; if any clerk was tried for a criminal offence, no matter what, all he had to do was to state that he was a priest and he was at once set free. In other words, he could not be punished. That doesn't concern us; but, I suppose, it resulted from the old notion that all priests were subject only to Rome, and to the church courts, and not to the civil law courts; and consequently when a priest was attempted to be tried in a civil law court, it was a way of doing what we should call "pleading to the jurisdiction" of the court. Later, as time went on, in England it was greatly abused, especially when there got to be clerks who were not priests. When it meant anybody who could read and write, and anybody who had committed a murder had only to say, "I can read and write," and be set free, it led to an extraordinary state of things. So, from time to time, they modified the benefit of the clergy, until ultimately it was abolished entirely; first by not allowing it in high offences like murder; then by imposing certain slight punishment—they were "burned in the hand"; then by applying it only to the first offence, and so on, until they got rid of it entirely; and this Statute of Marlborough is simply one of the first of that long chain of statutes which finally did away with it and prevented people from getting rid of a criminal prosecution merely because they knew how to read and write or were priests.

In 1275 I note the first use of the word parliament. I have used it from the beginning, but it is important to remember that the thing was not *called* parliament until 1275. Before that it was called the Great Council or the King's Council, and in Saxon times the Witenagemot.

Then we come down to the Statute of Westminster I. That is considered a great landmark in statutory legislation mainly because it is the first attempt to establish a code, or, at least, a large collection of the laws of England. It is an attempt to put what they supposed to be a good part of them into writing. We have no codes in this country, as a rule; nor to-day in England; the ordinary Anglo-Saxon does not believe in codes. It is the French and Germans who have codes. Nevertheless, you often find collections of statutes. It is important not to confound these things with codes, because they never pretend to be complete. Many States in this country never make revision of the statutes. Nevertheless, every ten or twenty years they will print a collection of the statutes arranged alphabetically. In some States, as in Massachusetts, those collections are official; but in other States they are simply matters of private enterprise. They are of no authority, and if they are wrong it is no protection to you. You are bound to know the laws. These early so-called codes, especially this code of Edward I, although it caused him to be called the English Justinian, because it was the first attempt of putting any large body of the Anglo-Saxon laws in writing at all, are still not at all *codes* in the technical sense. This one was merely a collection of a certain number of laws reduced to writing and re-enacted by Edward I. We note here the phrase "common right shall be done to rich and poor," rather an interesting landmark; it shows what progress was being made by the people in establishing their rights as freemen and to equal laws. For the laws of Norman England mainly applied to landowners, and were made by the barons, the only people that had property; there was but a small class in those early

days between the land-owners and actual serfs, villeins, who were practically attached to the soil, in a condition almost of servitude; they did service, were not paid wages, and couldn't leave the place where they were born—and both these are tests of slavery. But in the first two centuries after the Conquest the number of freemen very rapidly increased; men who were not property owners, not land-owners, but still freemen. Especially it increased in the towns, for the towns very early established their right to be free, far earlier than the country. It was very early established that the citizens of any town, that is, the members of the guild of the town, duly admitted to the guild, were freemen, and probably before this statute. But this is interesting as a recognition of the fact that there were free poor people—people without property, who nevertheless were neither villeins nor serfs—and that they were entitled to equality before the law, just as we are to-day, as early as 1275. Otherwise, the Statute of Westminster concerns mainly the criminal law. There is one very important provision—because it has been historically followed from then down to now—that there shall be no disturbance of the elections. Elections shall be free and unimpeded, uncontrolled by any power, either by the crown, or Parliament, or any trespasser. That has been a great principle of English freedom ever since, and passed into our unwritten constitution over here, and of course has been re-enacted in many of our laws. That is the feeling which lay behind those statutes which we enacted after our slaves were freed, for the making of elections free in the South; for protecting negroes in the act of voting and preventing interference with them by the Ku Klux Klan. The Democratic party strongly objected and objects still to such legislation on the part of the government, on the ground that the right of regulating elections belongs to the States and not to the Federal government; which, constitutionally speaking, before the Fifteenth Amendment at least, was true. They do not, of course,

deny this great old English principle that elections must be free and must not be intimidated or controlled by anybody; but, they say, we left the machinery of the elections in the hands of the States when we adopted the Federal Constitution; and although at our State elections some of the officers elected are Federal officers—as, for instance, the President of the United States, or rather the presidential electors, and members of Congress—nevertheless, when we adopted the Federal Constitution, the founders chose to rely for the machinery of a fair and free election upon the officers of States; so that the Federal government has nothing to do with it, and has no business to send Federal troops to the South; and they called such bills the "force" bill. In theory, of course, those elections were controlled in these bills just as much in the North as in the South; but there being practically no complaint in the North that the negroes were not allowed to vote, as a matter of fact the strength of the Federal government was only invoked in the Southern States.

"Fines are to be reasonable." You find that principle in all our constitutions to-day in the clause that there shall be no cruel or unusual punishments, and that fines shall be proportionate to the offence; this principle is expressed also in Magna Charta.

Then slander and rape were made criminal at common law; before this only the church took jurisdiction. Slander is the imputing of crime to a person by speech, by word of mouth. If it be a written imputation, it is libel and not slander. Then in this statute also we find the first import tax upon wool. The constitutionality of revenue taxes, duties, or taxes on imports, was once disputed by our parties; one party denying the constitutional right to impose any tax upon imports except for the strict purpose of raising necessary revenue; the argument being perfectly logical and based upon the constitutional principle we already have had that all taxation must be for the common benefit. Democrats argued

that if a tax upon imports was imposed to raise the necessary revenue, that is for the common benefit; but if it was imposed, as it avowedly is imposed in Republican legislation, for the purpose of benefiting certain industries or classes, why that, of course, is not for the common or general benefit and therefore unconstitutional. The trouble with this position is that early English laws were prohibitive of imports—that is, they were imposed for prohibition *before* they allowed importation on payment of duties. This Statute of Westminster is a landmark, as showing how slow the Commons were in even allowing taxation upon imports at all. They earlier allowed the ordinary direct taxes. All that the Norman kings got they got with the consent of Parliament, direct taxes, for the common benefit; but they struggled for two centuries before they got the permission of Parliament to impose duties, taxes upon imports; here first they finally got it on wool, the thing produced of most value of anything in England; and consequently an important protective duty. It is a curious historical fact that this article, wool, seems to be the chief bone of contention ever since; in our tariffs nothing has been more bitter than the dispute on wool; the duty on wool is the shibboleth of the extreme protectionist.[1] Ohio, which is the home of the strong protection feeling, regards the duty on wool as the corner-stone to the whole fabric. It is argued that "a cheap coat makes a cheap man." In the East the feeling is that the duty on wool makes clothing poor and shoddy, and the prices excessively high for the poor. It is odd to find that the very first thing that did make trouble was the duty on wool, and it is still making the same trouble to-day.

There is another interesting clause in this statute; I don't know whether in this country so much as there, but it is in England the almost universal custom of ships to have a dog

[1] The "ancient" customs were on wool, woolfels and leather; all other were "evil" customs. Holt, afterward C. J., in "The Great Case of Monopolies."

or cat on board. You never will find a coasting vessel without a dog or cat, usually both; and I believe it is for this strange historical reason, as shown in this Statute of Westminster I: In those days all wrecks belonged to the king. (Pretty much everything, in fact, did belong to the king, except the land that was held by book or charter, or such personal property as a man had in his own house—all mines, all franchises, all monopolies, even all whales and sturgeons that were thrown up on the beach—the head to the king and the tail to the queen.) So all wrecks belonged to the king. The result was, that whenever any vessel went ashore the king's officers seized it; and naturally the owner of the vessel didn't like that, because it very often happened that the vessel was perfectly good and could be easily repaired and the cargo saved. It is still a great principle in marine law that if one-half of the cargo is good, the man who owns the vessel cannot surrender and claim from the insurance company as a total loss; it is important still how much of a wreck a wreck is. But in those days the king, even if the vessel was stranded and could be raised, would seize it on the plea it was a wreck. The man who owned the ship would say she is perfectly seaworthy; and then would come the dispute as to what a wreck was. Or even when the vessel was destroyed, a great part of the cargo might be saved, and the owner of the vessel thought it very unjust that the king should claim it all. So the Parliament of England established as part of the liberties of the English merchant or trader that he should still have a property in his wreck; and then the question came up as to what was a wreck. It was generally admitted that when all hands were lost, that was a wreck; but they wanted to get as narrow a definition as they could, so they got Parliament to establish this law, that in future nothing shall be considered a wreck out of which a cat or a dog escapes alive; and from that time until the present day no vessel coasts about England without carrying a cat or dog.

But the great achievements of legislation up to 1300 remain the re-establishment of English law, as shown in the great charters of John, Henry III, and the confirmation of Edward I. And Magna Charta had to be read once a year (like our Declaration of Independence), and for breach of it a king might be excommunicated; and Henry III himself, according to Cobbet, feared that the Archbishop of Canterbury was about to do so.

IV

EARLY LABOR LEGISLATION, AND LAWS AGAINST TRUSTS

(1275) Far the most important phrase to us found in the Statute of Westminster I, save perhaps that common right should be done to rich and poor, is to be found in this sentence: "Excessive toll, contrary to the common custom of the realm," is forbidden. The statute applies only to market towns, but the principle established there would naturally go elsewhere, and indeed most towns where there was any trade were, in those days, market towns. Every word is noticeable: "Excessive toll"—extortion in rates. As this statute passed into the common law of England and hence our own, it has probably always been law in America except, possibly, in those few States which expressly repealed the whole common law[1] and those where civil law prevailed.[2] It was therefore equally unnecessary to adopt new statutes providing against extortion or discrimination, for the last part of the phrase "contrary to the common custom of the realm" means discrimination. But this is one of the numerous cases where our legislatures, if not our bar and bench, erred through simple historical ignorance. They had forgotten this law, or, more charitably, they may have thought it necessary to remind the people of it. There has been a recent agitation in this country with the object of compelling great public-service companies, such as electric lighting or gas companies, to make the same rates to con-

[1] Florida, Texas, and the old Territory of Dakota.
[2] Louisiana, New Mexico, and Arizona.

sumers, large or small. This also was very possibly the common law, and required no new statutes; there are cases reported as far back as the fourteenth and fifteenth centuries where, for instance, a ferryman was punished for charging less for the ferriage of a large drove of sheep or cattle than for a smaller number, "contrary to the common custom of the realm." Nine years before this statute is the Assize of Bread and Beer, attempting to fix the price of bread according to the cost of wheat, but notable to us as containing both the first pure-food statute and the first statute against "forestalling."

Now forestalling, regrating, and engrossing are the early English phrases for most of the unlawful or unmoral actions which we ascribe to the modern trust. In fact, there is hardly one legal injury which a trust is said to commit in these days which cannot be ranked under those three heads, or that of monopoly or that of restraint of trade.

"Forestalling" is the buying up provisions on the way to a market with intent to sell at a higher price; and the doctrine applied primarily to provisions, that is to say, necessaries of life. Precisely the same thing exists to-day, only we term it the buying of futures, or the attempt to create a corner. We shall find that the buying of futures, that is to say, of crops not yet grown or outputs not yet created, is still obnoxious to many of our legislatures to-day, and has been forbidden, or made criminal, in many States. "Regrating" is defined in some of the early dictionaries as speculating in provisions; the offence of buying provisions at a market for the purpose of reselling them within four miles of the place. The careful regulation of markets and market towns that existed in early times in England would not suffer some rich capitalist to go in and buy all that was offered for sale with intent of selling it to the same neighborhood at a higher price. Bishop Hatto of the Rhine, you may remember, paid with his life for this offence. The prejudice against this sort of thing has by no means ended to-day.

We have legislation against speculation in theatre tickets, as well as in cotton or grain. "Engrossing" is really the result of a successful forestalling, with or without regrating; that is to say, it is a complete "corner of the market"; from it our word "grocer" is derived. Such corners, if completely successful, would have the public at their mercy; luckily they rarely are; the difficulty, in fact, begins when you begin to regrate. But in artificial commodities it is easier; so in the Northern Pacific corner, a nearly perfect engrossing; the shares of stock went to a thousand dollars, and might have gone higher but for the voluntary interference of great financiers. Leiter's Chicago corner in wheat, Sully's corner in cotton, were almost perfect examples of engrossing, but failed when the regrating began. All these tend to monopoly, and act, of course, in restraint of trade; the broader meanings of these two latter more important principles we leave for later discussion.

(1285) The Statute of Bakers, or Assize of Bread and Ale, is by some assigned to the 13th of Edward I. If so, we find all these great modern questions treated by statute in the reign of the same great law-making king, Edward I, who well was called the "English Justinian"; for, in 1305, twenty years later, we have the first Statute of Conspiracy. This statute only applies to the maintaining of lawsuits; but the Statute of Laborers of 1360 declares void *all* alliances and covins between masons, carpenters, and guilds, chapters and ordinances; and from this time on the statutes recognize the English common law of conspiracy in general words.

As this is one of the most important doctrines of the English law, and moreover one which is most criticised to-day by large interests, both of capital and labor, it will be wise to dwell upon its historical and logical origin in this place, though we shall consider it at length later as it touches various fields of legislation. It is notable for two most important principles: first, that it recognizes the great menace of combined action, and both forbids and punishes combina-

tions to do an act which might be lawful for the individual; second, of all branches of civil, as distinct from criminal, law, it is the one which most largely recognizes intent; that is to say, the ethical purposes of the combination. It has been urged in some judicial opinions that in matters of boycotts, strikes, etc., the law cannot go into the motive; this argument obviously proves too much, for it is no more easy to examine motives in the criminal law, and this is done all the time. A homicide, for instance, will vary in all degrees between justifiable guilt or manslaughter up to murder in the first degree, according to the motive which prompted the act. It is really no more difficult, and the reported cases do not show it to be any more difficult, to consider the motive behind a combination of men or the motive inspiring a series of related acts. The real trouble comes only in the Federal anti-trust act, because the machinery of this clumsy statute, a bill in equity, imposes upon judges the duty of finding the facts.

This doctrine of conspiracy is so old in England that I am unable to trace it to its source. From the wording of repeated early statutes it would seem that they recognized this law of conspiracy as already existing and merely applied it to new forms, such as, for instance, the combination of masons, carpenters, and guilds, just mentioned. It is, perhaps, not to us important whether it is originally based on common law or these early statutes, for these statutes are quite early enough to have passed into the common law of England, and consequently into the common law in this country. Moreover, early statutes merely express the common law; therein lies their significance. Now, many State laws and constitutions, as well as most State courts, recognize that the common-law statutes of England existing at least before 1775, if not 1620,[1] are common law in the States of this Union. In a general way, any statute that

[1] 1607 (Virginia, West Virginia, Illinois, Indiana, Missouri, Arkansas, Colorado, Wyoming); 1776 (Florida, Maryland, Rhode Island, Pennsylvania). None, however, are law in New York.

antedates the time of our settlement we took over as part of our common law.

We are now coming also to that great range of statutes, which, on the one hand, control labor and regulate the rights of the laborer, both in his prices and in his hours; and, on the other, those statutes relating to what we call "trusts," conspiracy, and trades-unions, which have made common-law principles which are to-day, all of them, invoked by our courts; and form the precedents of practically all our modern legislation on matters affecting labor, labor disputes, injunctions, strikes, boycotts, blacklists, restraint of trade, and trusts—in fact, the largest field of discussion now before the mind of the American people. The subjects are more or less connected. That is, you have the growth of legislation as to laborers on the one hand, and on the other you have the growth of this legislation as to combinations or conspiracies, trades-unions, guilds, etc.

(1304) Now let us begin at that first statute of conspiracy, and find what the definition of a conspiracy is; because it is a very important question to-day, whether we are going to stick to the old common-law idea or not. The very title of this statute is "A definition of conspirators," and it begins: "Conspirators be they that do confeder or bind themselves together by oath, covenant or other alliance" either to indict or maintain lawsuits; "and such as retain men in the Countrie with Liveries or Fees for to maintain their malicious Enterprises, and this extends as well to the Takers as to the Givers." And as it gradually assumed shape and got definite and broad, the idea, we will say, by 1765, when Blackstone wrote, was this: *A conspiracy is a combination by two or more men, persons or companies, to bring about, either an unlawful result by means lawful or unlawful, or a lawful result by unlawful means.* Now so far the definition is admitted. Everybody agrees, both the labor leaders and the courts, on that definition—that when two or more people combine together to effect an *unlawful* object, it is a conspiracy; which is both

a criminal offence under the laws of the land everywhere, and also gives the party injured a right to damages, that is, what we call a civil suit; and furthermore no *act* is necessary. There is no doubt about that part of the definition. Or where they combine to get a lawful end by unlawful means, as, for instance, when laborers combine to get their employer to raise their wages by the process of knocking on the head all men that come to take their places, that is gaining a lawful end by unlawful means, by intimidation—and is a conspiracy. But now the whole doctrine in discussion comes in: If you have a combination to bring about by *lawful* means the *injury* of a third person in his lawful rights—not amounting to crime—is that an unlawful conspiracy? Yes—for it is a "malicious enterprise." So is our law, and the common law of England, yes. And you can easily see the common-sense of it. The danger to any individual is so tremendous if he is to be conspired against by thousands, hundreds of thousands, not by one neighbor, but by all the people of the town, that it early got established as a principle of the common law, and of these early English statutes, that, although one man alone might do an act which, otherwise lawful, was to the injury of a third person, and be neither restrained nor punished for it, he could not *combine with others* for that purpose by the very same acts. For instance, I don't like the butcher with whom I have been doing business; I take away my trade. That, of course, I have a perfect right to do. But going a step farther, I tell my friends I don't like Smith and don't want to trade with him—probably I have a right to do that; but when I get every citizen of that town together at a meeting and say: "Let us all agree to ruin Smith, we will none of us trade with him"—Smith is bound to be ruined. The common law early recognized this importance of the principle of combination, and therefore it was part of the English common law and is still, barring one recent statute, that a combination to injure a person, although by an act which if done by one

individual would be lawful, is nevertheless an unlawful combination; that is, a *conspiracy* under the law; for all "conspiracies" are unlawful, under the law; the meaning of the word *conspiracy* in the law is, not an innocent combination, but a guilty one, and anything which is a *conspiracy* at law can be punished criminally, or will give rise to civil suits for damages by the parties injured, or usually entitle one to the protection of an injunction. A conspiracy, therefore, is not only a guilty combination, of two or more persons, for an unlawful end by any means, or for a lawful end by unlawful means, but also one for an immoral end, a malicious end, as, let us say, the ruin of a third person, or the injury of the public. All the dispute about the law of conspiracy and the statutes and what laborers can do and what employers can do to-day really hinges about that last clause. The labor leaders, the radicals, want to say that nothing shall be a conspiracy where the end is not unlawful and where the acts done are such as, if done by an individual, would not be wrong. In other words, they want statutes to provide that nothing is a conspiracy where the acts done are in themselves lawful if done by one individual. But this English conspiracy law was of the most immense sociological value, in that it did recognize the tremendous power of *combination*. It said, although you don't have to trade with Smith alone, yet a combination of a great many individuals for the purpose of ruining Smith, by all simultaneously refusing to trade with him, is such a tremendous injury to Smith that the law will take cognizance of it and hold that kind of a combination to be unlawful.

This definition should be further extended, perhaps, to remind you that the courts hold that there are certain kinds of combinations, contemplating ends which will necessarily result in the use of unlawful means; the most familiar example is picketing. The courts mostly hold that although in theory a labor union can march up and down the highway and peacefully advise non-union men or other laborers not

to take their jobs, in practice such action usually, if not necessarily, goes to the point of intimidation; and intimidation is nearly always made unlawful by statute. Now I should only add that it is very important to remember—and even the courts do not always remember it—that the thing being punished as a conspiracy is not the end, but the combining; the conspiracy itself is the criminal act. Suppose in Pennsylvania one thousand men meet and say: "John Smith has taken a job and is a scab, and we will go around and maul him to-night," and they do, or they don't; if they are tried, the fact whether they did maul him or not has nothing to do with the matter of the conspiracy. They might, of course, be tried for assault and battery, or for an attempt to commit murder; but if they are being tried for the *conspiracy* the criminal act is the combining and meeting, not what they do afterward. Therefore it is of no importance whatever what the result of the matter is. The thing that is criminal is the combining; and this leads to a very curious consequence: All conspiracies are criminal; but the object aimed at may be very slightly so. So that it is perfectly possible to have a conspiracy which shall result to its members in five or ten years in the state-prison, whereas the object itself, the act aimed at, may have been comparatively slight, a mere misdemeanor. Take the case of mere intimidation without assault or battery; one man goes to another and says: "If you take that work I shall smash your head," that is intimidation. Thirty of our States have made that unlawful, but it is only a misdemeanor. But if one thousand men get together and say: "We will go around to tell him we will smash his head," that is conspiracy; and conspiracy may subject them to penalty of years in prison. It has been found in the experience of the English people to be such a dangerous power, this power of combination, that to use it for an unlawful or wrongful end may be more of an offence than the end itself.

A combination to injure a man's trade is, therefore, an

unlawful conspiracy; well shown in a recent Ohio case where a combination of several persons to draw their money out of a bank simultaneously for the purpose of making it fail, was held criminal. It gives a claim for damages in a civil suit and may be enjoined against. But is it necessarily criminal? It is possible that the offence to the public is so slight that the criminal courts would hardly take cognizance of it in minor cases where there is not some statute expressly providing for a criminal remedy. The Sherman Act, our Anti-trust Act, does so where even two persons conspire together to restrain interstate commerce. It is a crime at common law, however slight, for even two to combine to injure any person's trade. But, independent of statutes, suppose only two persons agree not to buy of a certain butcher in Cambridge: in theory, he might have a civil remedy; but it may be doubted that it would amount to a criminal offence. *Lex non curat de minimis.* So, it is an offence under most State anti-trust laws, as it was at the common law, to fix the price of an article—that is restraint of trade—or to limit the output. Two grocers going to the city in the morning train agree that they will charge seven dollars a barrel for flour during the ensuing week; two icemen, to harvest only a thousand tons of ice. The contract between them could not be enforced; it is undoubtedly unlawful; but it would hardly be a criminal offence at the common law. There is, at least at the common law, some middle ground between those contracts which are merely unenforceable, and those which subject the co-makers to a criminal liability; although under the cast-iron wording of a statute it may be that no such distinction can be made.

Independent of combination, there is probably no legal wrong in merely wishing ill to a man, withdrawing one's custom from him, competing with him, or even, possibly, in injuring his trade. There is an ancient case where the captain of an English ship engaged in a certain trade, to wit, the slave trade, arrived off a beach on the coast of Africa and

was collecting his living cargo, when a second ship, arriving too late to get a load itself, fired a cannon over the heads of the negroes, and they, with the chief who was selling them, fled in terror to the forest. The captain of the first ship went back to London and brought suit against the captain of the second ship for injuring his trade and was allowed to recover damages; but it may be doubted if that is good law; although in 1909 a Minnesota court decided that a barber could sue an enemy if he maintained an opposition barber-shop solely for the purpose of injuring his business; and a few years ago in Louisiana a street railway foreman was held liable in damages for instructing his men not to frequent the plaintiff's store.[1] I say to you: "Do not trade with Smith, he is not a good person to deal with," or, "Do not take employment with him, he will treat you cruelly"; and in either case, unless I can be convicted of slander, he has no remedy against me if I am acting alone.

Now, this great law of conspiracy applies equally and always to combinations of capital or of employers, to trusts, contracts in restraint of trade and blacklists, as well as to unlawful labor combinations, unlawful union rules, and boycotts. The statutes directed against both originated about the same time and have run historically on all-fours together. The old offences of forestalling and regrating may have been lost sight of, and possibly the statutes against them fallen into disuse, although they were expressly made perpetual by the 13th Elizabeth in 1570 and not repealed until the 12th George III in 1772; but the principle invalidating restraint of trade and contracts in restraint of trade remained as alive as that prohibiting unlawful combinations of labor. The latter, indeed, has largely disappeared. Both strikes and trades-unions, once thought unlawful in England, are made lawful now by statute, but a contract in restraint of trade or a monopolistic combination of capital is as unlawful as

[1] Tarleton *v.* McGawley, Peak, N. P. C. 270; Tuttle *v.* Buck, 119 N. W. 946; Graham *v.* St. Charles St. Ry. Co., 47 La. Ann. 214.

it ever was both in England and in this country; and the common law is only re-enforced by our State statutes and applied to matters of interstate commerce as well, by the Sherman Act. Closely connected with both is the principle of reasonable rates in the exercise of franchises; excessive toll contrary to common custom, as we found forbidden in 1275. The first statute against forestalling merely inflicts a punishment on forestallers and dates ten years later, 1285, though the time of this, the Statute concerning Bakers, is put by some still earlier, with the Assize of Bread and Beer, in 1266. It provides the standard weight and price of bread, ale, and wine, the toll of a mill. It anticipates our pure-food laws and punishes butchers for selling unwholesome flesh or adulterating oatmeal, and says "that no Forestaller be suffered to dwell in any Town, which is an open Oppressor of Poor People . .. . which for Greediness of his private Gain doth prevent others in buying Grain, Fish, Herring, or any other Thing to be sold coming by land or Water, oppressing the Poor, and deceiving the Rich, which carrieth away such Things, intending to sell them more dear, . . . and an whole Town or a Country is deceived by such Craft and Subtilty," and the punishment is put at a fine at the first offence with the loss of the thing bought, the pillory for the second offence, fine and imprisonment for the third, and the fourth time banishment from the town.

The first definition of forestalling is here given. Our modern equivalent is the buying of futures or dealing in stocks without intent to deliver, both of which have been forbidden or made criminal in many of our States. And forestalling, regrating, and engrossing were things early recognized as criminal in England, and these statutes embody much of what is sound in the present legislation against trusts.

Forestalling was very apt to be done in a *staple*, that is, in the town which was specially devoted to that article of trade; so that the laws of forestalling got very much mixed

up with the laws of the staple; but forestalling would equally mean going into any market and buying up all the production. If the article was produced abroad, the forestaller would try to buy up the entire importation.

(1352) We now find another statute; it applies to wines and liquors "and all other wares that come to the good towns of England," and the penalty imposed by that law was that the forestaller must forfeit the surplus over cost to the crown and be imprisoned two years. We are still enforcing remedies of that kind in our anti-trust laws, only instead of having him forfeit the surplus to the crown we usually have him pay damages, sometimes treble damages to the persons injured. In the Beef Trust case, the parties were duly convicted, and instead of being imprisoned, they were fined $25,000. In other words, we still have not the courage to go to the length that our ancestors did in enforcing the penalties of these unlawful combinations. Of course it is a much more difficult thing to have forestalling and engrossing laws against foreign importations than against home productions; and so to-day we have not tried, except by a tariff, forestalling laws against foreign importations, but we have attempted to apply them very much as to home productions. In England, however, the statute at that time said that a person who bought up all the foreign product must forfeit all the profits to the state. Now this is nothing but the "Iowa idea" of two years ago. It was suggested very urgently by Governor Cummins that there should be a law providing that where a trust got complete control of a certain industry in this country its surplus profit should be forfeited either indirectly by the taking off of the tariff, or by way of a franchise tax, that is, of a United States tax upon its franchises, which could be increased in such a way as to tax it out of existence if it persisted. The latter remedy is at the root of President Taft's new corporation tax, but Congress has not yet applied the former, although it was very seriously advocated that there should be statutes which should indirectly forfeit the

profits of the trust that had secured a monopoly; that is an engrossing trust—covin or alliance, as our ancestors would have called it—"a gentleman's agreement"—and that it should be done by a reduction of the tariff on the articles in which that trust dealt; this reduction to be ordered by the president. When he determined that a trust had completely engrossed an industry, he might say so by proclamation; and then the act of Congress should go into effect and the duties upon that product be abolished, all the protection of the trust taken away. There is a trouble with such legislation, in that it may be said to allow the president to make the law; and under our Constitution the president cannot make laws. The legislative branch and the executive branch of the government must be kept distinct; and it probably would be argued by constitutional lawyers, and in this instance by either party that was not in favor of such legislation, that to reduce the duties of such a class of goods was a legislative act, and therefore any such law would be unconstitutional because the president cannot legislate. But the point I wish to make now in both these cases is the exact correspondence of the problem; what are remedies to-day were remedies five hundred years ago. So far we have found nothing new, either in remedy or offence.

(1349) Now there is a third great line of legislation that we must consider in connection with these other two, and that is the Statutes of Labor. It was the custom in early times to attempt to regulate prices; both of wages and commodities. The first Statute of Laborers dates from 1349. Its history was economic. They had had a great plague in England known as the Black Death; and it had carried off a vast number of people, especially the laboring people. There was naturally great demand for workers. Laborers were very scarce. It is estimated that one-third of the entire population had died; and there has never been a time when wages were so high relatively, that is, when wages would buy so much for the workingman, as about the middle of the

fourteenth century. But the employers were no fonder of high wages than they are to-day. All England was used to sumptuary laws, laws regulating the price of commodities, and villeins still existed. They were only just beginning to consider agricultural laborers as freemen; they were used to the notion of exerting a control over laboring men, who were still often appendant to the land on which they worked, for it was unlawful for an agricultural laborer to change his abode; and in many other ways they were under strict laws. So that it didn't seem much of a step to say also, we will regulate the rate of wages—particularly as the payment of wages in money was rather a new thing. Probably two or three centuries before most wages were paid in articles of food or in the use of the land. So they got this first Statute of Laborers through; it required all persons able in body under sixty to do labor to such persons as require labor or else be committed to gaol. That, of course, is compulsory labor; the law would therefore be unconstitutional with us to-day except in so far as it applied, under a criminal statute, in regard to tramps or vagrants. In some States we commit tramps and vagrants to gaol if they won't do a certain amount of work for their lodging, under the theory that they have committed a criminal act in being vagrants. Otherwise this principle, a law requiring all persons to work, is now obsolete. Then it went on to say, no workman or servant can depart from service before the time agreed upon; lawful enough, to-day, although laborers do not like to make a definite contract. The South, however, has adopted this principle as to agricultural labor, just as in the England of the fourteenth century. Southern States have an elaborate system of legislation for the purpose of enforcing labor upon idle negroes, which, when it creates a system of "peonage," is forbidden by the Federal laws and Constitution. They are compelled, as in the old English statute, to serve under contract or for a period of time, and if they break it, are made liable by this statute to some fine or penalty imposed by the

nearest justice of the peace; and when they cannot pay this, they may be imprisoned. Finally, this Statute of Laborers first states the principle that the old "wage and no more" shall be given, thus establishing the notion that there was a legal wage, which lasted in England for centuries and gave rise to the later law under which strikes were held unlawful. Here, they meant such wages as prevailed before the Black Death.

(1350) The next year the statute is made more elaborate, and specifies, for common laborers, one penny a day; for mowers, carpenters, masons, tilers, and thatchers, three pence, and so on. It is curious that the relative scale is much the same as to-day: masons a little more than tilers, tilers a little more than carpenters; though unskilled labor was paid less in proportion. The same statute attempts to protect the laborer by providing that victuals shall be sold only at reasonable prices, which were apparently fixed by the mayor.

Here, therefore, we have the much-discussed Standard Wage fixed by law, but in the interest of the employer; not a "living wage" fixed in the interest of the employee, as modern thought requires. The same statute makes it unlawful to give to able-bodied beggars, which is of a piece with the compulsory labor of the able-bodied. Now this first Statute of Laborers, which led to centuries of English law unjust to the laborers, it is interesting to note, was possibly never a valid law, for it was never agreed to by the House of Commons. However that may be, the confirming statute of 1364 was duly enacted by Parliament, and this was not in terms repealed until the year 1869, although labor leaders claim it to have been repealed by general words in the 5th Elizabeth.

Thorold Rogers tells us that those, after all, were the happy days of the laborer—when masons got four pence a day, and the Black Prince, the head of the army, only got twenty shillings—sixty times as much. This is a fair modern

proportion, however, for military and other state service; though we pay the president a salary of nearly double that proportion to the yearly pay of a carpenter. But then, these English statutes applied mainly to agricultural labor; and domestic labor was paid considerably less.

This Statute of Laborers was again re-enacted in 1360, with a clause allowing work in gross, and forbidding "alliances and covins between masons, carpenters, and guilds." Work "in gross" means work by contract, piece-work, thus made expressly lawful by statute in England in 1360, but still objected to by many of our labor unions to-day. The provision against alliances and covins was extended to cover trades-unions, their rules and by-laws, as well as strikes, which were also considered combinations in restraint of trade. Now this was never law in this country.

There was a very early case in Pennsylvania, while it was still a colony, and there were others in the States soon after, which held that the Statutes of Laborers were never law in America. Our statutes early authorized trades-unions, but without this there is, I think, no American case where either a trades-union or a simple strike was held to be an unlawful combination. It was these early statutes which gave rise to the law that existed until the nineteenth century in England, that both strikes and unions were unlawful; a strike because it was usually a combination to raise the rate of wages, which was in theory fixed by law. Therefore, a strike was a combination with an unlawful aim, consequently a conspiracy. The logic is simple; and in the same way a trades-union was certainly an alliance between skilled workmen, and as such forbidden under the Statute of Laborers, besides being a combination in restraint of trade.

Now the guild, in so far as it was a combination of a trade in a town, was a perfectly lawful thing; in so far as it bore upon the right of a man to be a freeman, it was a perfectly lawful thing; it was only from the other end, from this statute I read as to combinations, that two or three centuries

later they got the notion that a trades-union was an unlawful thing; so you may say that a trades-union in England has a lawful root and an unlawful root, and it is rather important to see from which each class springs. The first case in which the modern strike was considered was a case known as the Journeymen Tailors' case, which happened more than two hundred years ago; and in that case it was definitely held to be an unlawful combination, while the first case on the modern boycott, where an injunction was awarded, is as late as 1868, this being the origin of that process which has evoked so much criticism here, the use of the injunction in labor disputes. The unskilled laborers in England have never combined; the only people who combined were the guilds, the skilled men, and in so far as they combined they did it rather as capitalists, employees, or as freemen, to govern the town; this was a lawful object; and the guilds rapidly grew into little aristocracies. They very soon ceased to be journeyman laborers, and became combinations of employers. Thus, the guild movement didn't amount to much in bringing about the modern trades-union or combinations of laboring men; it began before it occurred to these latter that they also could combine; just as, even now, it is more difficult among *women* to get them to join trades-unions, or for working women to combine; they have not apparently got into that stage of evolution; and so with the negroes in the South. But about the end of the eighteenth century you begin to find the first strikes and combinations of workingmen; and then what the courts promptly applied to them was not the old line of statutes, the historical common-law growth, deriving from a guild which in its origin was a lawful body and so making the union free and lawful, but naturally—for the magistrates were capitalists and land-owners, and all the courts were in sympathy with that class—they went back to the long series of Statutes of Laborers, and said "this is a combination of workingmen to break the law by getting more than lawful wages," and consequently found both

combinations unlawful, trades-unions and strikes, as well as when they were combinations to injure somebody, what we should now call a boycott.

The great Statute of Laborers which was for centuries supposed to settle the law of England is that of Elizabeth in 1562. Meantime, agricultural labor as well as industrial was getting to be free. A statute of 1377, which requires villeins refusing to labor to be committed to prison on complaint of the landlord, without bail, itself recognizes that villeins fleeing to a town are made free after a year and day's habitation therein. In 1383 came Wat Tyler's rising; the villeins demanded a commutation of agricultural labor to a money rent (four pence) and full freedom of trade and labor in all the market towns; and about this time was great growth of small freeholders.

(1388) The Statute of Richard II restricts laborers to their hundred and makes it compulsory for them to follow the same trade as their father after the age of twelve. The wages of both industrial and agricultural laborers are again fixed—shepherds, ten shillings a year; ploughmen, seven; women laborers, six shillings, and so on. Servants are permitted to carry bows and arrows, but not swords, and they may not play tennis or foot-ball. And here is the historical origin of the important custom of exacting recommendations: servants leaving employment are required to carry a testimonial, and none are to receive servants without such letter—the original of the blacklist. Here, also, we find the beginning of poor-law legislation, those unable to work are to be supported in the town where born. Villeinage, which began at the Norman Conquest, according to Fitz-Herbert, "because the Conqueror gave lordships with all the inhabitants to do with them at their pleasure to his principal followers, and they, needing servants, pardoned the inhabitants of their lives, and caused them to do all manner of service"—was now abolished by compensation in a money wage payment. The institution of villeinage is last mentioned in a commission

of Queen Elizabeth, 1574, directing Lord Burleigh and others in certain counties to compound with all such bondmen or bondwomen for their manumission and freedom.

(1389) The next year the practice of fixing wages at a permanent sum is abandoned and they are to be fixed semi-annually at Easter and Michaelmas by a justice of the peace. In 1402 we find the remarkable provision that laborers are not to work on feast days nor for more than half a day before a holiday. Such legislation would hardly be necessary in modern England, where, in many trades, no one works for a whole day after the holiday as well. In 1425 is another statute forbidding masons to confederate themselves in chapters; and in 1427 the attempt to fix wages by law is again abandoned and they are to be fixed by the justices as in 1389, "because Masters could not get Servants without giving higher Wages than allowed by the Statute."

(1436) Now, perhaps, we find the first use of the expression "restraint of trade," that most important phrase, in a statute forbidding by-laws of guilds or corporate companies "in restraint of trade," also forbidding unlawful ordinances by them as to the price of their wares "*for their own profit and to the common hurt of the people*," and such by-laws are made penal and invalid except when approved by the chancellor; and this statute of Henry VI is re-enacted again in 1503 under Henry VII, where by-laws of guilds, etc., restraining suits at law are made unlawful, and so "*ordinances against the common weal of the people*." The meaning and importance of such legislation as this has been, I hope, made clear above. Note the words "*to the common hurt of the people*" and "*against the common weal of the people*." From this century, at least, therefore, dates that doctrine of the common law which makes unlawful any contract or combination in restraint of trade, and it was left for the succeeding century to develop the last great principle, that against monopoly, caused either by unlawful combination of individuals or grant by the crown itself.

The right to labor or to trade was thus fully established in England, and from the very earliest times we find statutes that merchants may freely buy and sell. The Statute of York, to this effect (1335), is re-enacted sixteen years later, and again under Richard II in 1391; and their right to carry away one-half the value of their imports in money, spending the other half in English commodities, in 1401.

This general right of trade may be defined as the right of any man to work at what trade he chose, and to buy or sell what and where he will, in the cheapest market. This right was indeed fundamental and needed no express statute. But all these laws concerning by-laws or combinations to prevent people from exercising their trade, or showing what were the liberties of trade in London and other towns (of which there are many) are exemplifications of it. That this law is far older than the statutes is well shown by an actual law report of a case decided in 1221 and first published by the Selden Society in 1877:

"The Abbot of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Peche, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it and that he never heard any such proclamation made by anyone. It is considered that he do defend himself twelve-handed (with eleven compurgators), and do come on Saturday with his law."

This is a remarkable report, for in twelve lines (ten lines of the law Latin) we have here set forth all the important principles of the law of boycott. The abbot complains that the Shrewsbury people do him many injuries "against his liberty," *i. e.*, the abbot claims a constitutional right to freely conduct his own business; then we have the recognition of the threat of a boycott as a particularly illegal act: "They

have caused *proclamation* to be made that none sell merchandise to the abbot." This is nothing but our modern "unfair list." The defendants admit the illegality of their conspiracy, because they deny it as a fact; and the bedell likewise denies that he ever made such proclamation or threat, whereupon (the plaintiff being a man of the church) they are set to trial by wager of law instead of by actual battle, neither party nor the court making any question of the illegality both of the conspiracy and of the act complained of.

There is no question then that all contracts in unreasonable restraint of trade were always unlawful in England and are so therefore by our common law. There was probably no real necessity for any of our anti-trust acts, except to impose penalties, or, as to the Federal or Sherman Act so-called, to extend the principles of the common law to interstate commerce, which is under the exclusive jurisdiction of the Federal government. The common law, however, made the exception of *reasonable* restraint of trade, which the Sherman Act does not; that is to say, a contract between two persons, one of whom sells his business and good-will to the other and agrees not to embark in the same trade for a certain number of years or in a certain prescribed locality, was a reasonable restriction at the common law. So, if two merchants going down town to their business agree in the street car that they will charge a certain amount for a barrel of flour or a ton of coal that week, this would probably be regarded as reasonable at the common law; but the common law, like these early statutes of England, looked primarily, if not exclusively, to the welfare of the consumer; they always speak of the common weal of the people, or of combinations to the general hurt of the people, and general combinations to fix prices or to limit output are therefore always unlawful; so a combination that only one of them should exercise a certain business at a certain place—like that of our four great meat-packing firms, who are said to have arranged to have the buyer for each one in turn appear in the cattle market, thus

being the only buyer that day—would be unlawful, when the restraint of trade resulting from an ordinary purchase would not be.

The fixing of ordinary prices, not tolls, was thoroughly tried in the Middle Ages and failed. Nor has it been attempted since as to wages, except in New Zealand by arbitration, and in England and (as to public labor) in the State of New York and a few other States where we have a recent statute that all employment in public work (that is, work for any city, county, or town, or the State, or for any contractor therefor) must be paid for "at the usual rate of wages prevailing in the trade"; this principle, taken from the last form of the English Statute of Laborers, being passed in the interest of the laborers themselves and not of the employers, as it was in early England. The result of this first piece of legislation was to impose some twenty thousand lawsuits upon the city of New York alone; the laborers working for a year or two at the rates paid by the city and then, after discharge, bringing suit and claiming that they had not been paid the "usual rate" of the trade; and as there were very heavy penalties, it is said to have cost the city of New York many millions of dollars. In the same way the union idea of having all trades under the control of an organization was carried to its extreme result in the Middle Ages also, so that the guilds became all-powerful; they imposed their rules and regulations to such an extent that it was almost impossible for any man to get employment except by their permission and under their regulation, or without membership. They naturally developed into wealthy combinations, more of employers than of journeymen, until they ended as the richly endowed dinner-giving corporations that we see in the city of London to-day. In France, at least, they were considered the greatest menace to labor, and were all swept away at the time of the French Revolution amid the joy of the masses and the pealing of bells. Unfortunately, our labor leaders are sometimes

scornful of history and unmindful of past example; the fact that a thing has been tried and failed or has, in past history, developed in a certain manner, carries no conviction to their minds.

(1444) A servant in husbandry had to give six months' notice before leaving and wages were again fixed; and in 1452, the time of Jack Cade's Rebellion, one finds the first prototype of "government by injunction," that is to say, of the interference by the lord chancellor or courts of equity with labor and the labor contract, particularly in times of riot or disorder.

But the first trace of this practice, now obnoxious to many under the phrase quoted, dates back to 1327, when King Edward III found it necessary to adopt some more effectual measures of police than those which already existed. For this purpose justices of the peace were first instituted throughout the country with power to take security for the peace and bind over parties who threatened offence.[1] Fifty years later, in the reign of Richard II, it was found necessary to provide further measures for repressing forcible entries on lands. The course of justice was interrupted and all these provisions were rendered in a great degree ineffectual by the lawless spirit of the times. The Statute of 1379 recites that "our Sovereign Lord the King hath perceived . . . that divers of his Liege People claiming to have Right to divers Lands, Tenements, and other Possessions, and some espying Women and Damsels unmarried . . . do gather them together to a great Number of Men of Arms and Archers . . . not having Consideration to God, but refusing and setting apart all Process of the Law, do ride in great Routs . . . and take Possession of Lands and in some Places do ravish Women and Damsels, and bring them into strange Countries." Therefore the Statute of Northampton, the 2d of Edward III, is recited and confirmed and the justices

[1] See "Injunctions in Conspiracy Cases," Senate Document No. 190, 57th Congress, 1st Session, p. 117.

of the king's commission ordered to arrest such persons incontinent without tarrying for indictment or other process of law. But that this summary process was already obnoxious to the people was shown by the fact that it was repealed the very following year because the articles "seemeth to the said Commons very grievous." Only the Statute of Northampton is preserved, and those who had been so taken and imprisoned by virtue of said article without other indictment "shall be utterly delivered."

(1384) It is noteworthy that at the same time that this extra-common-law process begins in the statutes, we have other statutes vindicating the power of the common-law courts. For instance, six years later, in the 8th of Richard II is a clause complaining that "divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and discussed, are of late drawn before the Constable and Marshal of England, to the great Damage and Disquietness of the People." Such jurisdiction is forbidden and the common law "shall be executed and used, and have that which to it belongeth . . . as it was accustomed to be in the time of King Edward." Again, four years later, it is ordained "that neither Letters of the Signet, nor of the King's Privy Seal, shall be from henceforth sent in Damage or Prejudice of the Realm, nor in Disturbance of the Law."

(1388) The next year we find a new Statute of Laborers confirming all previous statutes and forbidding any servant or laborer to depart from service without letters testimonial, and if found wandering without such letters shall be put in the stocks. Short of the penalty of the stocks, a condition of things not very dissimilar is said to exist to-day in the non-union mining towns of the West. In Cripple Creek, for instance, no one is allowed without a card from his previous employer which, among other things, sets forth that he is not associated with any labor union. This Statute of Richard II also provides that artificers and people of Mystery, that is to say, handicraftsmen, shall be compelled to do

agricultural labor in harvest time. (The high prices of to-day, some one has said, are really caused not so much by the trusts or even by the tariff, as by voluntary idleness; if a man will not work, neither shall he eat, but the lesson has been forgotten! In the more prosperous parts of the country, in Massachusetts, for instance, it is sometimes impossible to give away a standing crop of grain for the labor of cutting it, nor can able-bodied labor be secured even at two dollars per day. The Constitution of Oklahoma, which goes to the length of providing that there shall be no property except in the fruits of labor, might logically have embodied the principle of this Statute of Richard II; and we know that in Kansas they invite vacation students to harvest their crop. So in France, practically every one turns out for the vendange, and in Kent for the hops; a merriment is made of it, but at least the crop is garnered.) The Statute of Richard goes on to complain of the outrageous and excessive hire of labor, and attempts once more to limit the prices, but already at more than double those named in the earlier statute: ploughmen seven pence, herdsmen six pence, and even women six pence a day, and persons who have served in husbandry until the age of twelve must forever continue to do so. They may not learn a trade or be bound as apprentices. Servants and laborers may not carry arms nor play at foot-ball or tennis; they are encouraged, however, to have bows and arrows and use the same on Sundays and holidays. Impotent beggars are to be supported by the town where they were born.

(1387) The barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals;[1] and in 1389 we find another statute complaining of the courts of the constable and marshal having cognizance of matters which can be determined by the common law, and forbidding the same; and the statute of the previous year concerning laborers is confirmed, except

[1] Spence, 1 Eq. Jur., 346.

that wages are to be fixed by a justice of the peace, "Forasmuch as a Man cannot put the Price of Corn and other Victuals in certain." Shoemakers are forbidden to be tanners, and tanners to be shoemakers; a statute which seems to have been much debated, for it is continually being repealed and re-enacted for a hundred years to follow.

(1392) The Statute of York, giving free trade to merchants, is re-enacted, and it is specified that they may sell in gross or by retail "notwithstanding any Franchise, Grant or Custom," but they are forbidden to sell to each other for purposes of regrating and they must sell wines in the original package and "Spicery by whole Vessels and Bales." "All the weights and measures throughout the Realm shall be according to the Standard of the Exchequer"—save only in Lancashire, where they are used to giving better measure.

(1402) Laborers are forbidden to be hired by the week or to be paid for holidays or half days. In 1405 the old Statute of Laborers is re-enacted, particularly the cruel law forbidding any one to take up any other trade than husbandry after the age of twelve, nor can any one bind his child as apprentice to learn a trade unless he has twenty shillings per annum in landed property.

(1414) The 2d of Henry V recites the Statute of the 13th of Henry IV against rioters, but power to suppress them is intrusted to the justices of the peace and the common-law courts "according to the law of the land." Only if default is made in suppressing them the king's commission goes out under the great seal, showing the beginning of the use of the executive arm in suppressing riots, of which our most famous instance was the action of President Cleveland in the Pullman-car strike in Chicago in 1893. And in the same statute the chancery arm is invoked, that is to say, if any person complain that a rioter or offender flee or withdraw himself, a bill issues from the chancery, and if the person do not appear and yield, a writ of proclamation issues that he be attainted, a more severe punishment than the six months'

imprisonment usually meted out to our contemners. It is interesting to notice that the bills (petitions for legislation) are now in English; though the statutes enacted are still in French or Latin.

(1425) A statute recites that "by the yearly Congregations and Confederacies made by the Masons in their general Chapiters and Assemblies, the good Course and Effect of the Statute of Labourers be openly violated . . . and such Chapiters and Congregations are forbidden and all Masons that come to them are to be punished by imprisonment and fine"—an excellent example of the kind of statute which led to the doctrine that trades-unions were forbidden by the common law of England.

(1427) The next year the attempt to fix wages by law is again abandoned, and they are to be fixed by the justices, "because Masters cannot get Servants without giving higher Wages than allowed by the Statute."

The exact time of the appearance of the modern corporation has been a matter of some doubt. Its invention was probably suggested by the monastic corporation, or the city guild. This whole matter must be left for a later chapter, but we must note the phraseology of a statute of Henry VI in 1426, which speaks of "Guilds, Fraternities, and other Companies corporate," and requiring them to record before justices of the peace all their charters, letters-patent, and ordinances or by-laws, *which latter must not be against the common profit of the people*, and the justices of the peace or chief marshal are given authority to annul such of their by-laws as are not reasonable and for the common profit—the fountain and origin of a most important doctrine of the modern law of restraint of trade and conspiracy.

(1444) Servants in husbandry purposing to leave their masters were required to give warning by the middle of the term of service so that the "Master may provide another Servant against the End of his Term." Again a maximum price is fixed for the wages of servants, laborers, and artif-

icers: the common servant of husbandry, fifteen shillings a year, with money for clothing, eleven shillings; and women servants ten shillings, with clothing price of four shillings, and meat and drink. But winter wages are less and harvest wages more than in summer; and men who refuse to serve by the year are declared vagabonds.

(1450) John Cade was attainted of treason, and in 1452 comes the famous statute giving the chancellor power to issue writs of proclamation against rioters or persons guilty of other offences against the peace, with power to outlaw upon default, quoted by Spence [1] as the foundation of the practice of issuing injunctions to preserve the peace, now bitterly complained of by Mr. Gompers and others; and it is most noteworthy as sustaining this adverse view that the Statute of Henry VI itself makes special exception, "That no Matter determinable by the Law of this Realm shall be by the same Act determined in other Form than after the Course of the same Law in the King's Courts having Determination of the same Law," and the act itself is only to endure for seven years.

(1487) This year a Statute of Henry VII originates the criminal jurisdiction of the Court of Star Chamber,[2] an interesting statute reciting that the Mayor and Aldermen of London have forbidden citizens to go to fairs or markets, or trade outside the city, which is declared "contrary to the common weal of England" and the ordinance made void. In 1495 the laws against riots and unlawful assemblies are recited and confirmed, and authority to punish and prevent them given to the justices and the common-law courts, except that the justices themselves in a case of such disorder by more than forty persons are to certify the names of the offenders

[1] "1 Eq. Jur.," 353.

[2] This court, says Lord Coke, was originally established to protect subjects against the offences and oppressions of great men by extortion, frauds, riots, unlawful assemblies, etc., leaving ordinary offences to the courts of common law and Clarendon adds that "whilst it was gravely and moderately governed, it was an excellent expedient to preserve the peace and security of the kingdom." Nevertheless, "having become odious by a tyrannical exercise of its powers, it was abolished by a Statute of 16 Charles 1."

to the king and his council (that is to say, the Star Chamber) for punishment. In 1495 the wages of servants in husbandry and of artificers and shipwrights, master-masons and carpenters are again fixed, with the hours of work and meal time provided; in March, from 5 A. M. till 7 or 8 P. M., but with half an hour for breakfast, an hour and a half for dinner, and half an hour for supper, and in winter time from dawn till sunset, and "said Artificers and Laborers shall slepe not by day" except between May and August; but this whole act "for the common wealth of the poor artificers" is repealed the following year.

(1503) This year there is another important statute against private and illegal by-laws, reciting that "companies corporate by color of rule and governance to them granted and confirmed by charters and letters patent of divers Kings made among themselves many unlawful and unreasonable ordinances as well in price of wares as other things for their own singular profit and to the common hurt and damage of the people," and such by-laws are forbidden unless specially authorized by some official such as the chief governor of the city. The law so far dates from the 15th of Henry VI; but the present act goes on to provide that "no masters, fellowships of crafts or rulers of guilds or fraternities make any acts or ordinances against the common profit of the people but with the examination and approval of the Chancellor and Chief Justice of England, and that there shall never be any by-law to restrain any person from suits in the common-law courts." A Federal statute similar to this was proposed by a late president to apply to all corporations, or at least to all corporations conducting interstate commerce; the approval of their by-laws or other contracts to be by the Federal commissioner of corporations; while the last section forbidding trades-unions to deny to their members the right of suing them or other persons in the ordinary courts is part of our constitutional law to-day and much objected to by the unions themselves, as it was in the time of Henry VII. The tend-

ency to create special courts (commerce, patents, etc.) seems to be beginning anew, despite the malign history of the ancient courts of the Constable and Marshal, Star Chamber, Requests, Royal Commissions, etc.

(1512) Under Henry VIII the penalty for paying higher wages than the law allowed was removed from the employer and applied only to the employee taking the wage; and in 1514 comes perhaps the most elaborate of all the earlier acts fixing the wages and hours of labor. Their meal times and sleep times are carefully regulated, they are forbidden to take full wages for half-day's work and forbidden to leave a job until it is finished, and the rates of pay of bailiffs, servants, free masons, master carpenters, rough masons, bricklayers, tilers, plumbers, glaziers, carvers, joiners, shipwrights, ship carpenters, calkers, clinchers, agricultural laborers, both men and women, mowers, reapers, carters, shepherds, herdsmen, and possibly others, are again prescribed; this list of trades in the England of the early sixteenth century is interesting. Bailiffs who assault their overseers may be imprisoned for a year, and an exception is made from the act of all miners of lead, iron, silver, tin, or coal, "called See Cole, otherwise called Smythes Coole," or for making of glass, but that part of the act fixing wages was repealed the very next year as to the city of London.

(1514) The abuse of monopolies begins to be shown this year (but see also 1503, above) in a statute complaining of the grant of second patents of a matter already granted; and avoiding in such cases the later patent unless the king express that "he hath determined his pleasure against the first."

The appearance of the gypsies in England is marked by a statute of 1530, describing them as "outlandish people called Egyptians," complaining of their robberies, and requiring them to depart the realm. In the same year first appeared the celebrated Act for the punishment of beggars and vagabonds and forbidding beggary, and requiring them to labor or be whipped. Herbert Spencer states in his "Descriptive

Sociology" that it punishes with loss of an ear the third conviction for joining a trades-union, which, if true, would justify much of the bitterness of modern labor unions against the common law. The provision evidently referred to (22 Henry VIII, chapter 12, section 4) applies, however, not to guilds, but to "Scolers of the Universities of Oxford and Cambridge that go about begging not being authorized under the seal of the said Universities" as well as to other beggars or vagabonds playing "subtile, crafty and unlawful games such as physnomye or palmestrye." The same year is an interesting statute against foreign artificers exercising handicrafts in England, not without example in the labor legislation of our modern States; but exempting beggars, brewers, surgeons, and scriveners as not handicraftsmen, possibly the origin of the vulgar notion that those trades are more genteel than skilled labor.

(1535) Another statute against sturdy vagabonds and "ruffflers found idling after being assigned to labor," and already having their ears so slit, are punishable with death. This year Wales was joined to England; and we see the first act for the suppression of monasteries; the next year came the statute extinguishing the authority of the Bishop of Rome. With the struggle against the Roman Church went the contest for freedom; *inter arma silent leges;* sociological legislation came to an end for the rest of the reign and arbitrary laws passed at the king's desire; in 1536, the act authorizing kings of England, on arriving at the age of twenty-four, to repeal any act of Parliament made during their minority, and in 1539 the "Act that Proclamations made by the King shall be obeyed"—the high-water mark of executive usurpation in modern times. Proclamations made by the king and council were to have the force of acts of Parliament, yet not to prejudice estates, offices, liberties, goods or lives, or repeal existing laws; the cardinal constitutional rights were thus preserved, even as against this royal aggression.

(1548) Under Edward VI and Elizabeth we may expect

more enlightened legislation, and are not disappointed. Indeed, no one can read the statutes of the great queen without seeing that modern times here begin. Nevertheless, while trade is becoming free, labor is no less severely, if more intelligently, regulated. We first note a short but important statute touching victuallers and handicraftsmen, worth quoting in part: "Forasmuche as of late dayes divers sellers of vittayles, not contented withe moderate and reasonable gayne . . . have conspyred and covenanted together to sell their vittels at unreasonable price; and lykewise Artyficers handycrafte men and laborers have made confederacyes and promyses and have sworne mutuall othes, not onlye that they shoulde not meddle one withe an others worke, and performe and fynishe that an other hathe begone, but also to constitute and appoynt howe muche worke they shoulde doe in a daye and what howers and tymes they shall work, *contrarie to the Lawes and Statutes of this Realme.*" (It is extraordinary how closely this old statute sets forth some practices of the modern trades-union.) "Everie person so conspiring covenantinge swearing or offendinge . . . shall forfeyt for the firste offence tenne pounds . . . or twentie dayes ymprisonment" with bread and water; for the second offence, twenty pounds or the pillory, and for the third offence forty pounds, or the pillory and lose one of his ears. After that he is to be taken as a man infamous and his oath not to be credited at any time, and if there be a corporation of dealers in victuals or of handicraftsmen so conspiring, it shall be dissolved—the origin and precedent of the Sherman Act! This, of course, is the statute which Herbert Spencer cites as making a "third conviction for joining a trades-union punished with loss of an ear"; but he places the date at 1535 instead of 1548. The statute, however, goes on to provide absolute freedom of employment or trade for all skilled mechanics in any town, although not freemen thereof, whether they dwell there or not, any town or guild by-law to the contrary notwithstanding; so that this impor-

tant statute may be said to establish the most enlightened view that there must be absolute liberty of employment granted any one, only that they must not conspire to the injury of others. Unfortunately, in the very next year this last part is repealed as to the city of London, "Artificers and Craftmen of that ancient City complaining that it was contrary to their ancient privilege," a view as modern as is the law itself. Immediately after this law is one providing that journeymen, clothiers, weavers, tailors, and shoemakers shall not be hired for less than a quarter of a year on penalty of imprisonment to them and the employer, the statute reciting that, once out of their apprenticehood, they "will not commonly be retained in service by the year, but at their liberty by the day, week or otherwise, to the intent that they will live idly, and at their pleasure flee and resort from place to place, whereof ensuith more incovenyencies then can be at this present expressed and declared"—an inconvenience not unknown in modern intelligence offices. All employers having more than three apprentices shall keep at least one journeyman, and unmarried servants in husbandry must serve by the year.

(1550) In the 3d of Edward VI we find the first Riot Act, aimed at persons to the number of twelve or above assembling together and proposing to alter the laws and not dispersing when so required by the sheriff, and even persons more than two and less than twelve assembling for such purpose are subject to fine and imprisonment with treble damages to parties injured, and if forty persons so assemble and do not disperse in three hours, they are declared felons. This statute was re-enacted and made more severe in the reign of Queen Mary.

(1562) In the 5th of Elizabeth comes the last and greatest Statute of Laborers. This statute is a consolidation of all previous laws, and it begins by recognizing the principle that the fixing of wages is a mistake and all such laws are repealed so far as they relate to terms of hiring and wages. Servants in certain employments, generally speaking the tailoring and

shoemaking trades, may still be hired by the year, and persons unmarried, not having an income of forty shillings a year, may be compelled to serve in their own handicraft. Such yearly servants may not be dismissed or depart during the year except by cause allowed by two justices, nor at the end of a year, without a quarter's warning. Unmarried persons under thirty, not having any trade and not belonging to a nobleman's household, may be compelled to labor at the request of any person using an art or mystery, and all persons between twelve and sixty not otherwise employed may be compelled to serve by the year in husbandry. The masters may not dismiss, nor the servants unduly depart; nor leave the city or parish of their service without a testimonial; that is to say, a certificate of due cause under the seal of the town or constable and two honest householders. The hours of labor are still fixed from 5 A. M. to 7 P. M., between March and September, with two and one-half hours for meal times, drink times, and sleep. From September to May, from dawn to sunset, and sleep times only allowed from May to August. A penalty of one month's imprisonment and fine is imposed on artificers and laborers leaving their work unfinished. Wages are still to be fixed by the justices of the peace, and it is made a penal offence to give or receive higher wages than the lawful rate, and all contracts for higher wages are void. Unmarried women between twelve and forty may be compelled to serve in like manner, and everybody has to work at harvest time, that is to say, artificers as well as laborers. The elaborate law of apprenticeship dates also from this great statute, and no one can use a manual art who has not been apprenticed to the same for seven years. One journeyman shall be kept for each three apprentices; disputes are to be settled by the justices of the peace, and indeed the whole labor contract is regulated as carefully as the most statute-mad of modern labor leaders could desire, though hardly, perhaps, then, in the sole interest of the workingman. If this statute was ever repealed, it was in very recent times.

(1571) The year of the statute against fraudulent conveyances, and of another poor law, with provisions for the punishment of "rogues, vagabonds and sturdy beggars," who are defined to include those going about the country "using sybtyll craftye and unlawfull Games or Playes . . . Palmestrye . . . or fantasticall Imaginacons. . . . Fencers Bearewardes and Common Players," and the penalty for harboring such vagabonds was twenty shillings. We are a long time from the knighting of Sir Henry Irving. In 1575 comes another act for setting the poor to work, and the punishing of tramps and beggars.

In 1571 also is the first formal complaint of monopolies by the Commons. Coal, oil, salt, vinegar, starch, iron, glass, and many other commodities were all farmed out to individuals and monopolies; coal, mentioned first, is still, to-day, the subject of our greatest monopoly; while oil, mentioned fourth, is probably the subject of our second greatest monopoly; and iron, mentioned seventh, is probably the third. Conditions have not changed. The only reason we don't have salt still a monopoly is on account of the numerous sources and processes for obtaining it from mines and from the sea; Fugger, the John D. Rockefeller of the sixteenth century (whose portrait in Munich strongly resembles him), had a monopoly of the salt mines of all Germany. The conditions have maintained themselves, even as to the very articles. This grievance was first mooted in Parliament in 1571 by a Mr. Bell, "who was at once summoned before the Council." This council was the King's Council, or Privy Council—a body roughly corresponding to our United States Senate. He was summoned before the council for objecting because coal, oil, salt, vinegar, starch, iron, glass, were the subjects of monopoly; and he "returned to the House with such an amazed countenance that it daunted all the rest." That is very much the fate of the tariff reformer to-day, if we may credit the tales of those returning from Washington.

After a lapse of twenty-six years the Commons ventured

again. This time the queen replied that she hoped her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden, but promised to examine all patents and abide the touchstone of the law. Nevertheless, four years later the list of articles subject to monopoly was so numerous that when it was read over to the House in 1601 an indignant member exclaimed: "Is not bread amongst them? Nay, if no remedy is found for these, bread will be there before the next Parliament." The Populists openly cursed the monopolies and declared that the prerogatives should not be suffered to touch the old liberties of England. Seeing that resistance was no longer politic, Elizabeth sent a message to the House saying that some of these monopolies should be presently repealed, some superseded, and none put in execution but such as should first have a trial according to law for the good of the people; and Robert Cecil, the secretary, added an assurance that all existing patents should be revoked and no others granted for the future. The Commons waited upon the queen with an address of thanks, to which she replied almost affectionately that never since she had been queen "did I put my pen to any grant but upon pretence made to me that it was good and beneficial to the subjects in general, though a private profit to some of my ancient servants who had deserved well. Never thought was cherished in my heart which tended not to my people's good." Notwithstanding these fair words, the House of Commons found it necessary to enact the Great Statute against Monopolies.

(1623) In the beginning, the statute recites that "Your most excellent Majestie in your Royall Judgment . . . did in the yeare . . . 1610 . . . publish in Print to the whole Realme and to all Posteritie, that all Graunt of Monapolyes and of the benefitt of any penall Lawes, or of power to dispence with the Lawe . . . are contrary to your Majesties Lawes, which your Majesties Declaracon is truly consonant and agreeable to the auncient and fundamentall Lawes of

this your Realme. . . . Nevertheles . . . many such Graunts have bene undulie obteyned . . . For avoyding whereof and preventinge of the like in tyme to come, May it please your most excellent Majestie . . . that it may be declared and enacted, and be it declared and enacted by the authoritie of this present Parliament That all Monapolies and all Commissions Graunts Licenses Charters and lettres patents heretofore made or graunted, or hereafter to be made or graunted to any person or persons Bodies Politique or Corporate whatsoever of or for the sole buyinge sellinge makinge workinge or usinge of any things within this Realme or the Dominion of Wales, or of any other Monopolies, or of Power Libertie or Facultie to dispence with any others, or to give Licence or Toleracon to doe use or exercise any thinge against the tenor or purport of any Lawe or Statute . . . are altogether contrary to the laws of this realm and so are or shall be utterly void and in no wise to be put in use or execution." Section 2 provides that all such monopolies and the force and validity of them ought to be and should forever hereafter be examined, tried, and determined by and according to the common law; section 4, that a party aggrieved might have treble damages, as in our modern Sherman Act. There followed provisos for exempting existing patents for twenty-one years or less for new inventions or like future patents for fourteen years or less, the charters of the city of London, or any custom or customs of London, or any other city or town, for corporations, companies, or fellowships of any art, trade, occupation, or mystery; that is to say, exempting the guilds, but these guilds by this time had long ceased to be societies of actual journeymen or handicraftsmen. This great statute may fairly be classed among the constitutional documents of England, and it left the great fabric of the English common law guaranteeing freedom of labor and liberty of trade, Magna Charta itself recognizing this principle, and the Statute of Westminster I forbidding forestalling and excessive toll contrary to the laws of England,

as it has remained until the present day—only rediscovered in the statutes of our Southern and Western States aimed against trusts, and reapplied by Congress, in the Sherman Act, to interstate commerce; but in neither case added to, nor, possibly, improved.

Two years before this great statute, the process of impeachment, not employed for nearly two hundred years, had been revived against Sir Giles Mompesson and Sir Francis Mitchell, who in the Parliament of 1621 were impeached "for fraud and oppression committed as patentees for the exclusive manufacture of gold and silver thread, for the inspection of inns and hostelries, and for the licensing of ale-houses. While no definite articles were presented according to modern forms, an accusation was made by the Commons and a judgment rendered by the Lords, condemning both to fine, imprisonment, and degradation from the honor of knighthood." Nevertheless, Charles I revived the system of monopolies and raised revenue by their application to almost every article of ordinary consumption as well as by enormous fines inflicted through the Star Chamber, both important matters leading to his dethronement.[1] Elizabeth granted monopolies on the perfectly madern pretence that a monopoly, be it made by law or by tariff, is for the benefit of the public good, though at the same time possibly a private profit to certain individuals, friends of the sovereign.

But all this early legislation of England was far better and more advanced than our own; for in all these questions of duties on exports and duties on imports and monopolies, they never consider the man who has the monopoly, the producer; but always they are avowed to be, petitioned for, declared to be, only in the interests of the *consumer;* which cannot be said to be the case with ourselves.

[1] See Dowell, "History of Taxation," vol. I, pp. 204–209.

V

OTHER LEGISLATION IN MEDIÆVAL ENGLAND

(1275) The Statute of Westminster I has sometimes been termed a great English code; it is certainly a comprehensive statement by statute of a considerable portion of existing law. In our consideration of labor and conspiracy laws we have had to include statutes of later centuries. Now, returning to the year of the Statute of Westminster, we found, in 1275, also the Statute of Bigamy, aimed against priests with more than one wife. It is to be noted that this was centuries before the celibacy of priests became one of the doctrines of the Roman Catholic Church. It is also interesting that this early statute refers to the pope as "the Bishop of Rome"—but only as printed since 1543.

(1279) The Statute of Mortmain, aimed at the holding of land in large quantities by religious corporations, was a true constructive statute, and the principle it establishes has grown ever since. The law regards with jealousy the ownership of land by any corporation; the presumption is against the power, and it extends to-day to all corporations, and particularly to alien corporations (see chapter 7); and in 1283 came the Statute of Acton Burnel, re-enacted in 1285 and called the "Statute Merchant," equally important. It provides for the speedy recovery of debts due merchants, and is the foundation of all our modern law of pledge, sales of collateral, etc. It is distinctly an innovation on the common law; for in those days there was no method of collecting ordinary money debts. You could levy on a man's land, but there really seems to have been no method of recovering

a debt contracted in trade; and this is the first of many statutes adopting foreign ideas as to matters of trade, and the customs of merchants, drawn frequently from the Lombard or Jew traders of the Continent, which, by statute law, custom, or court decision, has since become such a considerable body of the English law as to have a name to itself—the "Law Merchant." This first statute provides for imprisonment for debt; "if he have no goods to be seized the debtor is to be imprisoned, but the creditor shall find him bread and water." A foreigner coming to England to recover a debt may also recover the expenses of his trip; and the statute is further liberal in that it does away with the *Droit d'Aubaine*, that narrow-minded custom by which the goods or personal property of any person who died passing through the kingdom were seized by the authorities and could not be recovered by his heirs. This mediæval injustice continued for some centuries in Germany and France, and we can hardly say that the notion is extinct in this country when a State like California, by her system of public administrators, practically impounds a large proportion of all personal property owned by non-residents at their death. Cases have been known where it cost the executor more than one-third of the money to collect a mortgage, owned by a deceased citizen of Massachusetts, in California; and for that reason, among others, Eastern lawyers have advised against investments in that State; for the public administrators are usually petty politicians in search of a job. The increasing burden of our State inheritance tax laws, whereby every State wherein a corporation exists besides the State of the deceased seizes its percentage of the stock of such corporation in the hands of the executors, is another step in this direction. This early Statute Merchant, liberal in other respects, still excludes Jews from its benefits.

(1284) Jury trial was well established by this time, for the Statute of Wales includes it in its code of procedure for that principality. The great Statute *De Donis*, or West-

minster II, came the following year; most interesting to lawyers as the foundation of estates tail; but it also regulates "assizes or juries" that "rich men do not abide at home by reason of their bribes." It also specifically requires indictment "of twelve lawful men at least," and gives an action against sheriffs imprisoning without such warrant "as they should have against any other person." Rape, ten years before made punishable only by two years' imprisonment, is now made an offence punishable by loss of life or member; showing how our ancestors treated a burning question, at least in our Southern States, of to-day. Finally, it confirms and explains the writ *de odio et atia*, the predecessor of the modern *habeas corpus*. Some writers have doubted whether this writ existed as a practical remedy much before the Statute of Charles II; but here it says that parties indicted, etc., are to have the writ *de odio et atia* "lest they be kept long in prison, like as it is declared in Magna Charta." This can only refer to C. 36 of John's Charter, "the writ of inquest of life or limb to be given gratis and not denied"; and taken in connection with the action for damages just given affords a fairly complete safeguard to personal liberty. It also contains the first game law, protecting "salmons." "There are salmons in Wye," says Shakespeare, and we are reminded of it because the Statute of Winchester in the same year contains a provision that is almost literally quoted by Dogberry in "Twelfth Night." It provides for the gates of great towns to be shut at sunset, and that no citizen should bear arms, and no tavern sell drink after 9 P. M., and then it comes to the duties of the watch, which are described in such like manner that Dogberry's language seems a mere paraphrase. Whoever wrote the play certainly had read the Statutes of the Realm for the year 1285, but so far as I am aware, the Baconians have not yet called attention to this. And the same statute shows us how much better police protection the England of 1285 gave than the New York or Chicago of 1909; for all the people dwelling in the hundred

or country (county) if they do not deliver the body of the offender, "shall be answerable for the robberies done and also the damages." The same year was a statute of "The common customs of the City of London," among which was one that "taverns should not be open after 9 P. M. for the selling of wine or ale," a regulation for their "tenderloin," which itself is described in quite modern terms; "none shall walk the streets after curfew." Possibly the same year is the Statute of Bakers, with careful provisions against putrid meat, worthy of consideration by our cold-storage plants. Butchers selling unwholesome flesh, or buying it of the Jews, were severely punished.

(1289) The Statute of Quo Warranto is another historical landmark, showing the jealousy our ancestors felt of officials, bureaucracy; a writ specially devised to enable them to challenge the right of any magnate who pretended to power by virtue of holding office, and the predecessor of our modern *quo warranto*, which we still use at all times for that purpose, not only as against officers but to test any special privileges or charters claimed, such as the right to a monopoly, a franchise, a ferry, etc. These may be still tried by *quo warranto ;* meaning, by what warrant do you claim to exercise this office, this monopoly, this privilege?

About this time is another statute forbidding usury, and permitting Christian debtors to retain half of all debts they may owe to the Jews, who are required to wear the mark of two cables joined on their coats; and there is the great Statute of Westminster III, *Quia Emptores*, affecting land tenures, still of importance to the conveyancers. In 1295 we have the famous Model Parliament; that is to say, the first one where kings, lords, and commons were joined, the legislative branches sitting separately and the Commons represented. Two years later Edward I, carrying on the war in Flanders, was compelled to grant that great confirmation of the charters already referred to, that no aid or tax should be taken but by the common consent of the realm

and for the common profit; restoring thus into the recognized charter that important provision of the original Charter of John; and it provides that the great charter shall be read twice a year in every cathedral in England. In our country I am aware of no provision for reading the Constitution, though the Declaration of Independence, an obsolete document, is occasionally read upon the Fourth of July.

In 1305 the Anglo-Norman law reports begin, the Year Books. From then to now, at least, we have continuous written reports of all important cases decided in England. This is not to say that we do not have them before (our people, first in the world's history, has the records of all its cases in high courts for nigh a thousand years), but they are now for the first time systematic.

(1309) On the accession of Edward II came the Summary of Grievances, recited in the Statute of Stamford as recognized by Edward I at the close of his reign. The seizure of supplies by the king without due payment; the maintenance of courts at the gates of the king's castles in derogation of the common-law courts; the taking of "new customs," two shillings per tun of wine, two shillings for cloth and other imports, "*whereby the price to the people is enhanced*"; the debasement of current coin; that petitions of the Commons to Parliament were not received, etc., etc. All duties were then suspended, in order to know and be advised "what Profit and Advantage will accrue to him and his People by ceasing the taking of those Customs"—a precedent it were to be wished we might have the intelligence to follow to-day—surely better than a tariff commission!

Two years later came the New Ordinances, which contain a most interesting precedent, hitherto almost unnoted, of the American principle of having the courts construe the Constitution. Section VI: "It is Ordained, That the Great Charter be kept in all its points in such manner, that if there be in the said Charter any point obscure or doubtful, it shall be declared by the said Ordainours, and others whom

they will, for that purpose, call to them, when they shall see occasion and season during their power." Section XXXVIII: "That the Great Charter . . . and the Points which are doubtful in it be explained by the advice of the Baronage and of the Justices, and of other sage Persons of the Law." It was ordained that the king should not go out of the realm, a precedent never violated until modern times, and even followed by our own presidents, except for Roosevelt's trip to Panama and Taft's to the borders of Mexico. Again we find "new customs" abolished, "as upon Wools, Cloths, Wines, Avoir de pois, and other Things, whereby the Merchants come more seldom, and bring fewer Goods into the Land, and the Foreign Merchants abide longer than they were wont to do, by which abiding things become more dear," saving only to the king his duty on wool and leather, half a mark for a sack of wool and one mark for a last of leather. "The king shall hold a Parliament once in the year or twice if need be, and that in a convenient place." This principle has maintained itself in the English mind, still more in the American mind, ever since. To this day, in Massachusetts, for instance, we cannot get a constitutional amendment to have the legislature sit only once in two years, though it would probably be a very wise reform, on account of this old inherited feeling that there is something peculiarly free about an annual parliament, as indeed there is. The Anglo-Norman kings called parliaments once a year or oftener. Most of the States in this country now have their legislatures sit every two years. Alabama and some other States have recently changed, that they only sit once in four years. But the conservative old States, like Massachusetts and New Jersey, have still the rule that the legislature sits every year; and the prejudice in favor of the annual legislature goes back at least as far as this law of 1330, where the Commons succeeded in getting a law that Parliament should sit as often as once in a year, and is incorporated in England's and Massachusetts' Bill of Rights.

And then we find the first statute restraining what we should now call chancery jurisdiction, complaining that the law of the land and common right was delayed by letters issued under the king's will, and ordaining that henceforth they shall not be disturbed by said letters and nothing done in any of the places of the court of the king or elsewhere by such letters against right or the law of the land shall avail.

In 1313 the coming armed to Parliament is forbidden. These were troublous times and there was little legislation in consequence, and in 1322 Edward II secured the revocation of the New Ordinances themselves, but as in all such cases of royal grant and withdrawal the principles shown are even the more important historically. Of uncertain period is the Statute of Jewrie forbidding usury to the Jews, and Christians from living among them, but permitting them freedom of trade and exempting them from taxation except to the king; and a statute of the usages and customs of the men of Kent beginning with the statement that "all the Bodies of Kentishmen be free, as well as the other free Bodies of England," which dates at least as late as the early part of the fourteenth century, but still exemplifying the notion that a statute should only express law or custom previously existing.

(1327) The Statute of Northampton, at the beginning of the reign of Edward III, confirms many of the earlier statutes, but abolishes all staples beyond the sea and on this side, on the ground that they tended to monopoly, and provided that all merchants, strangers, and citizens may go and come with their merchandises into England after the tenor of the great charter (cap. IX). In the next year is another provision for annual parliaments, and in 1335 the Statute of York again allows merchants to buy and sell freely except only enemies, and giving double damages for the disturbance by any one of such freedom of trade, and the Statute *de Moneta*, forbidding carrying money abroad; which is notable to the student of economics as showing how early what we

now call the fallacy of the mercantile system appeared. Our ancestors thought that there was something peculiarly advantageous in a tariff or system of duties which put all the money into a country and allowed only goods to go out; and that opinion is perhaps not yet extinct.

There always seems to have been a notion that there is something peculiarly sacred about wool. So we find that in 1337 they made it a felony to carry wool out of England, or to wear cloth made out of England; and no clothes made beyond the seas were to be brought into England. That notion that a man ought to dress on home products lies behind our present McKinley tariff. Then, in 1340, you will find another statute for the liberties of merchants, that they should be allowed the freedom of the kingdom; and a new duty is imposed on wool. Then we find the abolition of the laws of "the staple"; foreign staple towns had been abolished just before. The "staple" was the *town* in which one commodity was mainly dealt in. Every commodity in England had some particular town, where the principal market was for it; just as, with us, the boot and shoe market of the United States is supposed to be in Boston, the money market in New York, beef and hogs in Chicago. In England, in the Middle Ages, they really provided that a certain trade should have its home in a certain town; not necessarily the only one, but very often in that one only. Thus there were certain towns for the carrying on of the wool industry; you could only trade in wool in those towns. The word "staple," from meaning the town or market, got applied by an easy process to the commodity dealt in; so that when we now say that the Vermont staple is hay, we mean that this is the main crop raised in Vermont. But the staple—like the modern stockyard or exchange—tended to monopoly and was abolished for this reason.

In 1340 and 1344 we find two picturesque statutes showing how the English were getting jealous of the Norman kings: "The realm and people of England shall not be subject to

the King or people of France"—that is, that the customs and law of France, although their kings were French, were not to be applied to England. Then in the royal edict that year when King Edward assumed the title, King of France, they caused him to put in a statement that no inference was to be drawn from his assuming the flower de luces in the first quarter of his arms. The present English coat of arms is modern; instead of having the Norman leopards in the upper right hand and lower left hand, they then had the blue field and the fleurs de lys of France in the upper, and the Norman leopards only in the lower corner; and this lasted until the time of Charles I. In that part of Normandy which now still remains to the English crown, that is, in Guernsey and Jersey, you find to-day that only the leopards, not the arms of Great Britain, are in use. But then again, in 1344, we have a statute (which, by the way, itself is written in French) complaining that the French king is trying to destroy the English language. They were getting very jealous of anything French; the Normans had already been absorbed; modern England was beginning to appear.

(1344) And now comes a liberal statute, repealing those restrictions on wool, and allowing it to be exported; and another statute that "the Sea be open to all manner of merchants." Now this is the origin of the great English notion of freedom to trade with foreign parts; and was principally relied upon three centuries later in the great case of monopoly (7 State Trials) brought against the East India Company. And England has assumed dominion of the sea ever since; "the boundaries of Great Britain are the high-water mark upon every other country."

(1348) This year was the plague of the Black Death, and the following year is the first Statute of Laborers discussed in an earlier chapter and elaborately amended in the following year. In 1350 also we find the Statute of Cloths, providing again for free trade in victuals, cloths, and any other manner of merchandise in all the towns and ports of Eng-

land, and punishing forestalling of any merchandise with two years' imprisonment and forfeiture of the goods, one-half to go to the informer. Two years later the forestalling and engrossing of Gascony wines is forbidden and even the selling of them at an advanced price, and this offence is made capital!—and the next year we have the most elaborate of the Statutes of the Staple re-established. This ordinance (1353) provides for a staple of wools, leather, wool fells, and lead in various towns in England, Wales, and Ireland. The safety of merchant strangers is provided for, and it is again made a felony for the king's subjects to export wool; and more important still, all merchants coming to the staple and matters therein "shall be ruled by the Law-Merchant and not by the common Law of the Land nor by Usage of Cities, Boroughs or other Towns," and any plaintiff is given the option whether he will sue his action or quarrel before the justices of the staple by the law thereof, or in the common-law court. Merchandise may be sold in gross or by parcels, but may not be forestalled; and the goods of strangers suffering shipwreck shall be restored to their owners on payment of salvage. Houses in staple towns must be let at a reasonable rate, and conspiracies or combinations against the law of the staple made criminal. Again our ancestors showed themselves more civilized than we, this time in their Custom-house proceedings; for Article 26 of this statute provides that "whereas a Duty is payable of three pence in the pound by all merchant strangers coming into the kingdom, they may show their letters or invoices to prove the value of their goods, and if they have no letters, they shall be believed by their oath . . . and now of late we understand by the Complaint of the said Merchants that although they have Letters or have made oath, nevertheless after the Oath made the bailiffs of the customs do unseal their Barrels, Fardels, and Bales for which they have taken their oath. We, not willing that Strangers that come into our Realm be in such Manner grieved, establish that when the

Letters or the oath be taken their Goods shall be delivered to them without delay and the bailiffs meddle no more of the same Goods upon Pain of Imprisonment and pay the Party grieved quatreple Damages." As is well known, it is the United States custom to insist upon the oath of the importer, and notwithstanding that, rummage open his trunks. Or are we to infer that people were more truthful in those days?

(1354) The export of iron is forbidden, and the justices given power to punish them that sell iron at too dear a price, but it does not appear how the prices are to be determined; and the Statute of the Staple is again re-enacted and the provision made that duty shall be paid only upon those goods which are actually sold in England and the merchant may re-export the balance—the first precedent of our laws of importing under bond. It is notable that this year the Statute of Laborers is extended to the city of London.

(1357) The Ordinance of Herrings is a most interesting example of early intelligence in dealing with a modern abuse. It provides "that no herring shall be bought or sold in the Sea, till the Fishers be come into the Haven with their Herring, and that the Cable of the Ship be drawn to the Land." That thereupon they may sell freely, but only between sunrise and sunset. "The Hundred of Herring shall be . . . six score, and the Last by ten Thousand and all Merchants must sell the Thousand of Herring after the Rate of the Price of the Last, and the people of Yarmouth shall sell the last [that is, the ten thousand red herring], bought for forty shillings for half a mark of gain and not above; and so the people of London for one mark of gain"; and the destruction of fish is prevented, but all caught must be sold. It is well known that the custom was to destroy all the fish brought into Billingsgate market above a certain quantity, which led Ruskin to cry out furiously that the real prices of the world were regulated by Rascals, while the fools are bleating their folly of Supply and Demand. One may guess to-day that most of the proceedings in the ports of Boston, New York,

or Gloucester would be highly criminal under this ancient law. So, in the Statute of Dogger (this ancient word meaning the ships that carry fish for salting to Blakeney, Cromer, and other ports in the east of England), the price of dogger fish is settled at the beginning of the day and must be sold at such price "openly, and not by covin, or privily," nor can fish be bought for resale, but must be sold within the bounds of the market. To-day there is not a quart of milk that goes into Boston that is not forestalled, nor possibly a fish that is not sold at sea or even before its capture; and the number of middlemen is many—when, indeed, they all are not consolidated into a trust. The destruction, directly or by cold storage, of milk, fish, eggs, or other food in order solely to maintain the price should to-day be a misdemeanor; and these early doctrines of forestalling and restraining trade should be to-day more intelligently applied by our judges—or by the legislatures, if our lawyers have forgotten them—for they all are "highly criminal at the common law."

In the reign of Edward III appears one of many cruel ordinances for Ireland. Although the Roman Church was then, of course, universal, the statute is addressed to "the Archbishops, Bishops, Abbots, Priors and our Officers both great and small of our land of Ireland," and recites that "through default of good government and the neglect and carelessness of the royal officers there [this is probably true enough] our land of Ireland and the Clergy and People thereof have been manifoldly disturbed and grieved; and the Marches of said Land situate near the Enemy, laid waste by Hostile Invasions, the Marches being slain and plundered and their Dwellings horribly burnt." The Marchers were, of course, mainly of English descent; and one notes that the Irish are frankly termed the Enemy. As a method of meeting this evil, the Saxon intelligence of the day could find no better remedy than to lay it to "marriages and divers other Ties and the nursing of Infant Children among the English and the Irish, and Forewarnings and Espyals made

on both Sides by the Occasions aforesaid," and it therefore forbids such marriages to be contracted between English and Irish, "and other private Ties and nursing of Infant Children." The statute notes that these dissensions do not occur only between the English and those of Irish blood, but as well between the English of birth and the English of descent living in Ireland; a condition which has, indeed, continued till to-day, Parnell and a host of famous Irishmen being of pure English descent.

In 1360 the exportation of corn is forbidden. We now, therefore, have that principle applied to wool, iron, and bread-stuffs—corn, of course, meaning all kinds of grain. There is another statute requiring Parliament to be held once a year; and, more interesting, that pleas should be made in the English language, for "the French tongue is much unknown in said Realm of England," but the judgments are to be enrolled in Latin. In 1363 another statute concerning diet and apparel fixes the price of poultry, a young capon three pence, an old one four pence, a hen two pence, and a pullet one penny "for the great Dearth that is in many Places." Department stores are anticipated by a clause complaining that the merchants called grocers do engross all manner of merchandise "by Covin and Ordinance made betwixt them, called the Fraternity and Gild of Merchants," and anticipates the prejudice against the modern department store by ordaining that merchants shall deal in only one sort of merchandise; and furthermore handicraftsmen are allowed to "use only one Mystery," that is, trade—which also anticipates a principle dear to modern trades-unions. The statute then regulates the diet and apparel of servants. They may eat once a day of flesh or fish, but the rest of their diet must be milk or vegetarian. Their clothing may not exceed two marks in value. People of handicraft and yeomen, however, are allowed to wear clothing worth forty shillings, but not silk, silver, nor precious stones. Squires and gentlemen of a landed estate less than one hun-

dred pounds a year may wear clothing to the value of four marks and a half, but not gold nor silver, precious stones nor fur. Merchants having goods to the value of five hundred pounds may dress like esquires and gentlemen to a value of six marks. Clerks, that is to say, persons having degrees from colleges, may dress like knights of the same income and may wear fur in winter and lawn in summer, and clothiers make clothes accordingly and drapers and tailors charge proportionately. This most interesting effort to interfere with private life stops short of regulating the use of wine or beer; and tobacco had not yet been discovered. It is all the more interesting to note that it was found so intolerable that it was repealed the following year; and little effort since then has been made to regulate the diet or dress or expenditure of Englishmen; it was declared in memorable language that "which was ordained at the last Parliament, of Living and of Apparel, and that no English Merchant should use but one Merchandise" be repealed, and "It is ordained, That all People shall be as free as they were before the said Ordinance," and "all Merchants, as well Aliens as Denizens, may sell and buy all Manner of Merchandises, and freely carry them out of the Realm . . . saving the Victuallers of Fish that fish for Herring and other Fish, and they that bring Fish within the Realm." Thus, after trying the opposite, we find triumphantly established in the middle of the fourteenth century the great English principle of freedom of life and trade. The legislation of this great reign ends with the prohibition of practising lawyers from sitting in Parliament and an ordinance that women might not practise law or "sue in court by way of Maintenance or Reward, especially Alice Perrers," Alice Perrers or Pierce having become unpopular as the mistress of the elderly king. Our courts have usually held that there is no common-law principle forbidding women to practise law, but from this ancient statute it would appear that such decisions are erroneous.

(1381) In 5 Richard II is a law absolutely forbidding the sale of sweet wines at retail. This law, with the testimony of Shakespeare, goes to show that England liked their wines dry (sack), but the act is repealed the following year, only that sweet wines must be sold at the same price as the wines of the Rhine and Gascony; and in the same year, more intelligent than we, is a statute permitting merchants to ship goods in foreign ships when no English ships are to be had. In 1383, according to Spence, the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals. The rest of the statutes of Richard II are taken up with the important statutes concerning riots and forcible entries, and regulating labor, as set forth in the last chapter.

The troublesome reign of Richard II closes with an interesting attempt to make its legislation permanent, as has sometimes been attempted in our State constitutions. The last section of the last law of King Richard declares "That the King by the Assent of the said Lords and Knights [note it does not say by consent of the Commons], so assigned by the said Authority of Parliament, will and hath ordained that . . . to repeal or to attempt the repeal of any of the said Statutes is declared to be high treason," and the man so doing shall have execution as a traitor. Notwithstanding, in the following year the first act of Henry IV repeals the whole Parliament of the 21st of Richard II and all their statutes; that it be "wholly reversed, revoked, voided, undone, repealed, and adnulled for ever"—so we with the States in rebellion, and so Charles II with the acts of Cromwell.

(1400) Under Henry IV is the first secular law against heresy, making it a capital offence. Upon conviction by the ordinary the heretic is to be delivered to the secular arm, *i. e.*, burnt. Note that the trial, however, still remains with the ordinary, *i. e.*, the clerical court. Under Henry IV also

we find a statute banishing all Welshmen and forbidding them to buy land or become freemen in England; and under Henry VI the same law is applied to Irishmen, and in the next reign to Scotchmen as well. The Irishmen complained of, however, were only those attending the University of Oxford. In 1402 we find Parliament asserting its right to ratify treaties and to be consulted on wars; matters not without interest to President Roosevelt's Congress, and in 1407 we find definite recognition of the principle that money bills must originate in the lower house.

For the purpose of his Chicago speech, it is a pity that Mr. Bryan's attention was never called to the Statute of the 8th of Henry VI, which forbids merchants from compelling payment in gold and from refusing silver, "which Gold they do carry out of the Realm into other strange Countries." An enlightened civic spirit is shown in the Statute of 1433, which prohibits any person dwelling at the Stews in Southwark from serving on juries in Surrey, whereby "many Murderers and notorious Thieves have been saved, great Murders and Robberies concealed and not punished." And the statute sweepingly declares everybody inhabiting that part of Southwark to be thieves, common women, and other misdoers. Fortunately, this was before the time that John Harvard took up his residence there.

In 1430 was the first statute imposing a property qualification upon voters.

In 1452 is a curious statute reciting that "Whereas in all Parts of this Realm divers People of great Power, moved with unsatiable Covetousness . . . have sought and found new Inventions, and them continually do execute, to the Danger, Trouble and great abusing of all Ladies, Gentlewomen, and having any Substance . . . perceiving their great Weakness and Simplicity, will take them by Force, or otherwise come to them seeming to be their great Friends . . . and so by great Dissimulation . . . get them into their Possession; also they will many Times compell them

to be married by them, contrary to their own liking." A writ of chancery is given to persons so constrained of their liberty to summon the person complained of, and if he make default be outlawed—an early example of "government by injunction" applied to other than labor disputes! I know no example of an American statute to this effect; presumably our women are lacking in "weakness and simplicity."

In 1463 is another curious sumptuary law prescribing with great care the apparel of knights, bachelors, gentlemen and their wives, making it criminal for tailors to make cloths not according to this fashion, and for shoemakers to make boots or shoes having pikes more than two inches long. No draper shall sell or women wear hose to the value of more than fourteen pence, nor kerchiefs worth more than ten shillings, but scholars of the universities "may wear such Array as they may," nor does the ordinance extend to judges or soldiers. The provision against long pikes to shoes appears to be considered of importance, for it was re-enacted in 1464. I have searched in vain for a statute relating to hatpins. Again in 1482 there is another long statute concerning apparel which seems to have been considered under the reign of Edward IV quite the most important thing in life. A more manly clause of the statute is concerned with the benefits of archery to England, reciting that "in the Time of the victorious Reign . . . the King's Subjects have virtuously occupied and used shooting with their Bows, whereby and under the Protection of Almighty God, victorious acts have been done in Defence of this Realm," and the price of long bows of yew is limited to three and four pence. The statutes now begin to be in English.

In 1488 the Isle of Wight is to be repeopled with English people for "defence of the King's auncien ennemyes of the realme of Fraunce."

In 1491 all Scots are to depart the realm within forty days upon pain of forfeiture of all their goods; it is not recorded that any remained in England. In 1491 Henry VII levied

an amazingly heavy tax upon personal property, that is to say, two fifteenths and tenths upon all "movable goodes cattales and othre thinges usuelly to suche xvmes and xmes contributory," with the exception of Cambridge and a few other favored towns. In 1495 the famous Oklahoma statute is anticipated by a law regulating abuses in the stuffing of feather beds.

In 1503 a statute recites that the "Longe Bowes hathe ben moche used in this his Realme, wherby Honour & Victorie hathe ben goten . . . and moche more drede amonge all Cristen Princes by reasone of the same, whiche shotyng is now greatly dekayed." So this mediæval Kipling laments that they now delight in cross-bows to the great hurt and enfeebling of the Realm and to the comfort of outward enemies, wherefore cross-bows are forbidden except to the lords, on penalty of forfeiture of the bow.

(1509) The reign of Henry VIII was one of personal government; and in those days personal government resulted in a small output of law-making by Parliament. Indeed, after 1523, under Cardinal Wolsey, Parliament was not summoned for seven years. In 1539 the attempt to do without popular legislation is shown in the act already referred to, giving royal proclamations of the king and council the force of law, a definite attempt at personal government which might have resulted in the establishment of an administrative law fashioned by the executive, had it not been for the sturdy opposition of the people under weaker reigns. But under the reign of Henry VIII also the great right of free speech in Parliament was established; and in 1514 the king manumitted two villeins with the significant words "Whereas God created all men free," vulgarly supposed to be original with our Declaration of Independence.

The important principle of a limitation for prosecutions by the government for penal offences dates from the first year of Henry VIII, the period being put, as it still is, at three years; and it is expressed to be for better peace and justice

and to avoid the taking up of old charges after the evidence has disappeared.

In 1515 is another act of apparel providing, among other things, that the king only shall wear cloth-of-gold or purple color, or black fur, and that no man under the degree of a knight may wear "pinched Shirts." In this reign also comes the famous Statute of Wills, permitting the disposal of land by devise, the Statute of Uses and other matters primarily of interest to the lawyer; the first Bankruptcy Act and the first legislation recognizing the duty of the secular law to support the poor, perfected only under Queen Elizabeth; but in the latter part of his reign there is little law-making that need concern us. The Statutes of Apparel continue, and the statutes fixing the price of wine, which, indeed, seems to have been the last subject so regulated. There is the "Bloody Statute" against heresy, and the first act against witchcraft, Tindale's translation of the Bible is prohibited, and women and laborers forbidden to read the New Testament. There is the first act for the preservation of the river Thames, and also for the cleaning of the river at Canterbury; and the first game law protecting wild-fowl, and a law "for the breeding of horses" to be over fifteen hands. The king is allowed to make bishops and dissolve monasteries; physicians are required to be licensed. The regrating of wools and fish is again forbidden, and finally there is an act for the true making of Pynnes; that is to say, they are to be double headed and the heads "soudered fast to the Shanke."

We are now approaching the end of our task, for the legislation after James I, with the exception of a few great acts, such as the Statute of Frauds and the Habeas Corpus Act, hardly concerns us as not being part of our inherited common law. The reigns of Elizabeth and James are to us principally notable for the increase of the feeling against monopolies, ending in the great Statute of James I. While we still find restrictions upon trade in market towns or in the city of London, they always appear as local restric-

tions and are usually soon repealed. The prejudice against regrating, that is to say, middlemen, continues, as is shown in a Statute of Edward VI, providing that no one shall buy butter or cheese unless to sell the same only by retail in open shop. That is to say, there must be no middleman between the producer and the retailer, and a definition of the word "retail" is given. In 1552, the 7th of Edward VI is a celebrated statute called the Assize of Fuel, applied to the city of London, notable because it forbids middlemen and provides that no one shall buy wood or coal except such as will burn or consume the same, "Forasmuche as by the gredye appetite and coveteousnes of divers persons, Fuell Coles and Woodd runethe many times throughe foure or fyve severall handes or moe before it comethe to thandes of them that for their necessite doo burne . . . the same"—under penalty of treble value.

In 1551 is the last elaborate act against regrators, forestallers, and engrossers, made perpetual by 13 Elizabeth, and only repealed in 1772. It recognizes all previous laws against them, but recites that they have not had good effect, and therefore in the first section gives a precise definition. *Forestalling*—the buying of victuals or other merchandise on their way to a market or port, or contracting to buy the same before they arrive at such market or city, or making any motion for the enhancing of the price thereof, or to prevent the supply, that is, to induce any person coming to the market, etc., to stay away. *Regrating* is narrowed to victuals, alive or dead, and to the reselling them at the fair or market where they were bought or within four miles thereof; and *engrossing* is given a definition very similar to our "buying of futures." That is to say, it is the buying or contracting to buy any corn growing in the fields or any other victuals within the Realm of England with intent to sell the same again. The penalty for all such offences is two months' imprisonment and forfeiture of the value of the goods, but for a third offence the person suffers forfeiture and may be

imprisoned. There is an important recognition of modern political economy made in the proviso that persons may engross corn, etc., when it sells at or below a certain price, not, however, forestalling it.

In 1554 is a statute for the relief of weavers, prohibiting "the engrossing of looms," thus anticipating one of the principal doctrines of Lassalle. In the same year, 1st of Philip and Mary, is a statute prohibiting countrymen from retailing goods in cities, boroughs, or market towns, but selling by wholesale is allowed, and they may sell if free of a corporation; and so cloth may be retailed by the maker, and the statute only applies to cloth and grocery wares, not apparently to food.

(1562) From the reign of Elizabeth dates the great Poor Law, enacted and re-enacted in 1562, 1572, and finally in 1601, recognizing fully the duty of the parishes to support their poor, but providing a system of organized charity and even licensing beggars in towns too poor to support all their paupers. Side by side with this, however, went the severe statutes against idlers and vagabonds recited in the last chapter. The first game laws date from about this period, prohibiting the snaring of birds and establishing close seasons, and also in 1584 we find the first forestry law for the preservation of timber in the southern counties. There is no provision for seeding, but the use in the iron works of wood for fuel is carefully regulated, and in order to preserve the forests in Sussex, Surrey, and Kent, it is provided that no new iron mills, furnaces, etc., shall be erected in those counties, showing the relative value that our forefathers placed upon these matters. The first incorporation of a trading company seems also to date from the time of Elizabeth. That is to say, the Muscovy Company was chartered in 1564, and the Merchant Adventurers for the discovery of new trades in 1566. In this same year is the celebrated act of Speaker Onslow, in telling Elizabeth that she is subject to the common law; from henceforward we are in modern times. In 1534 Henry VIII

declared himself supreme head of the Church of England; five years later with the dissolution of monasteries came the "Bloody Statute," whereby he attempted to vindicate his orthodoxy. The act was entitled "An Act abolishing diversity of opinion on certain articles concerning the Christian Religion," and insisted upon the sacraments, celibacy, masses, and confessions, but in 1548 the marriage of priests was made lawful, and in 1566 the pope forbade attendance at the English Church. Thus, Roman law was expelled in the first two or three centuries after the Conquest, the Roman Church in the sixteenth century, and it remained for the seventeenth to struggle with the last serious attempt at the Roman or Continental theory of personal government.

(1602) King James at his accession asserted the divine right, and his legislation, other than special bills for the restoration of attainted persons, or the confirmation of titles, is scanty, his reign being principally occupied with the conflict with Parliament, which he forbade from meddling with affairs of state. In the first year of his reign, the Statute of Laborers of Elizabeth was confirmed, as well as that against rogues and vagabonds; the ninth act of his first Parliament was "To restraine the inordinate hauntinge and tiplinge in Innes and Alehouses," and, indeed, much of his legislation is aimed at what should properly be called "sins" rather than "crimes"; the next act after this was one to restrain "all persons from Marriage until their former Wyves and former Husbandes be deade." And next came a statute against witchcraft. In 1603 is an act to prohibit people from eating anything but fish in Lent, entitled "An Acte to encourage the Seamen of England to take Fishe, wherebie they may encrease to furnishe the Navie of England." There was an act for the relief of skinners, and a charter given by Queen Elizabeth in the twenty-first year of her reign to the Eastland merchants for a monopoly of trade in those countries; it would be interesting could these early corpora-

tion charters and monopoly grants be printed, for they are not usually found in the statutes of the realm. In 1605 stage players are forbidden from swearing on the stage. In 1606 is an elaborate act for the regulation of the spinning, weaving, dyeing, and width of woollen cloth, and the same year is an act for "repressinge the odious and loathsome synne of Drunckennes," imposing a penalty or fine and the stocks. In 1609 an act of Edward IV is revived, forbidding the sale of English horns unwrought, that people of strange lands do come in and carry the same over the sea and there work them, one of the latest statutes against the export of raw material. In the last year of his reign comes the great Statute of Monopolies noted in the last chapter, and an act extending the benefit of clergy to women convicted of small felonies, for which they had previously suffered death, and another act for the repression of drunkenness. And the last statute we shall note, like the first, is concerned with regrating and engrossing; that is to say, it re-enacts the Statute of Edward VI prohibiting the engrossing of butter and cheese, and prohibiting middlemen. Thus restraint of trade and freedom of labor begin and end as the most usual subjects of English popular law-making.

A few words upon Cromwell's legislation may be of interest; for though it was all repealed and left no vestige in the laws of England, it had some effect upon the legislation of Massachusetts, Rhode Island, and Connecticut. Under the Commonwealth there was but one legislative chamber, and over that the protector exercised far more control than had been ventured by the maddest Stuart or Tudor. One would suppose that a period which represented the supremacy of the common people would be marked by a mass of popular legislation. Quite the contrary is the fact. In the first place, the Instrument of Government, prepared by the so-called Barebones Parliament, was supposed to be a sort of constitution; as a symbol of the change from absolute per-

sonal government to constitutional government under this Instrument, Cromwell exchanged his military sword for the civil common sword carried by General Lambert, who was at the head of the deputation praying the Lord General to accept the office of protector. It vested the supreme power in him, acting with the advice of the Council, with whose consent alone he could make war, and that Council was to choose future protectors. The legislative power resided in a single chamber, upon which he had a veto. There was an ordinary property qualification for voting, and religious liberty was guaranteed, except as to the papists. Only one Parliament, as a matter of fact, assembled under this Instrument of Government, and the very first legislative function it endeavored to exercise seemed to offend Cromwell, who promptly dissolved it with a file of soldiers. That was the end of constitutional government under the protector. The laws of the Rump Parliament, and the Barebones Parliament, are entirely omitted from the official Statutes of England, and only to be found in a rather rare volume. They mostly concern military affairs. The real reforms of government, like the abolition of the Star Chamber and feudal tenures, had in fact been carried out under Charles I.

A further word should be given to the origin of the business corporation, an almost accidental event, which has affected the world of trade and affairs more than the invention of printing, of the bill of exchange, and the Law Merchant combined. It would have been perfectly possible for the world to get on and do business without the modern corporation—without the invention of a fictitious person clothed with the enormously powerful attributes of immortality and irresponsibility. That is to say, men can act together or in partnership, but they are mortal, and at their death their personal powers end. The corporation may be immortal, and its powers, as well as its acquisitions, increase forever. Men are liable with all their estates for their con-

tracts and obligations. Men in corporations are only liable to the amount of their aliquot share of stock, or often not at all. Corporations may dissolve, and be reborn, divide, and reunite, swallow up other corporations or often other persons. Individuals cannot do so except by the easily broken bond of co-partnership.

Trading corporations for profit were *practically* unknown to the Romans, or even to Continental countries—scholastic precedents and the Venetian *commendam* to the contrary notwithstanding. They developed in England first out of the guild or out of the monastery; but the religious corporation, although regarded with great jealousy in the Statutes against Mortmain, which show that from the earliest times our ancestors feared the attribute of immortality that characterizes the corporation, have never had the principle of limited, or no, personal liability. That, indeed, is said to have been invented by the State of Connecticut (see below, chapter 10). They were, however, often clothed with monopoly. In 1643 we find the Fellowship of Merchant Adventurers of England, a business corporation, with power to levy money on the members, and exclusive powers to trade in its own products, which seem to have been clothing and woollen manufactures. We have already mentioned the earlier charter to the Eastland merchants. Mr. James Bryce has pointed out to me that the objection of monopoly would not have been felt so much to apply to a corporation chartered only for purposes of trade out of England. It would seem, therefore, that the invention and growth of the secular corporation was an accident of the legislation of Queen Elizabeth's time; and arose rather from this desire to get a monopoly, than from any conscious copying of the trade guilds, still less the religious corporations of earlier dates; for the trade guilds were nothing but a more or less voluntary association of men bound together in a very indefinite bond, hardly more of a permanent effective body than any changing group of men, such as a political party is,

from year to year; the only bond between them being that they happen at some particular time to exercise a certain claim at a certain place; and even the trade guilds, as we know, had somewhat the course of a modern corporation. They became overgrown, aristocratic, swollen in fortune, and monopolistic in tendency. To some extent in the English cities and towns, and still more in France, they became tyrannous. And in the previous reign of Henry VIII all religious corporations had been dissolved.

Not much, perhaps, remained for Cromwell's Parliament to do. The abuses of law-making, of the Star Chamber, and other non-common-law courts, of personal government, had been swept away under Charles I. In 1644 the Book of Common Prayer was abolished. In 1646 the bishops were abolished, in 1648 the king and the House of Peers, and in 1649 the king was beheaded. Cromwell's Parliament was more interested in the raising of money and the dividing up royal lands than in constructive legislation. They did find time to forbid the planting of tobacco in England, and to pass an act furthering the religion of Jesus Christ in New England; also a society for the foundation of the gospel in New England, with power to raise money or make collections for that purpose, provided always, they did not carry any gold, silver, plate, or money outside of England. An act claiming that "the Indians are renouncing their heathen sorceries and betaking themselves to English schools and universities," possibly refers to one Indian graduate of Harvard, Caleb Cheeshahteaumuck, of the class of 1665. There are statutes concerning the impressing of seamen; a bankruptcy act, a statute authorizing secular marriage without a priest or church ceremony, and the act for preferring veterans in the Spanish War in civil service, a statute which gives a respectable antiquity to our laws making a privileged class of veterans or the descendants of veterans of the Civil and Spanish Wars. Under Cromwell they could exercise any trade without apprenticeship; a recent South Caro-

linian statute providing that Confederate veterans could exercise any trade without paying the usual license tax was held unconstitutional by the Supreme Court of South Carolina itself.

VI

AMERICAN LEGISLATION IN GENERAL

Before approaching the actual field of American legislation, it may be wise to make a few general statements concerning it. It was some fifty years after the adoption of the Federal Constitution before it began in great bulk, but today we find in the States alone forty-six legislative bodies, and two of Territories, besides the Federal Congress and the limited legislatures of our insular possessions. Nearly all of these turn out laws every year; even when the legislatures meet biennially, they frequently have an annual session. Only in one or two Southern States have recent constitutions restricted them to once in four years. It would be a fair estimate that they average five hundred statutes a year, which would make, roughly speaking, twenty-five thousand annual laws. It has been well doubted by students of modern democracy, by Lecky and Carlyle, if this immense mass of legislation is a benefit at all. Carlyle, indeed, is recorded to have taken Emerson down to the House of Commons and showed him that legislative body in full function, only taking him away when he was sufficiently exhausted, with the query whether Emerson, though a Unitarian, did not now believe in a personal devil. Administrative law-making for the machinery of government there must always be, but for the rest, if we rely on the common law and its natural development alone, our condition will be far less hopeless than most of us might imagine. Indeed, as we shall so often find, it is the very ease and frequency of legislation that has caused our courts and law-makers to

forego the well-tried doctrines of the common law. Many of our statutes but re-enact it; when they go beyond it, it is frequently to blunder. Moreover, it is a commonplace that no law is successful that does not fairly express the thought and customs, the conditions, of the mass of the people. Professor Jenks of Oxford applies to all other legislation the term "fancy legislation," or, as we might say, freak legislation—the caprices and desires of the present legislature or their constituents, carried immediately into law; and we may say at the outset that such legislation has rarely proved wise, and hardly ever effective. It is needless to state that many modern statutes—like prohibition laws, for instance—are passed for that very reason. Yet whatever the fact may have been in the past, there is no doubt that for the future, legislation by the people, constructive law-making at the popular behest, is the great new fact of Anglo-American civilization. There has just been brought out an immense index, under the auspices of the British Government, called "The Legislation of the Empire, being a Survey of the Legislative Enactments of the British Dominions, from 1897 to 1907." This work fills four huge volumes, and gives but the briefest possible index-headings of the statutes of the British Empire for that period. Our excellent "Index of Legislation," published by the New York State Library, contains about six hundred pages, and even this is hardly more than an index, as the title suggests.

Now, this tremendous increase in legislative output, most notable in the States of the United States, did not begin with us at once. For some forty or fifty years after the Revolution our State legislatures made as little constructive legislation as did the Parliament of George III. It was with the end of the first quarter of the nineteenth century that the great increase began. It seems to have taken democratic legislatures some fifty years to become conscious that they had this new unlimited power, and not only that they possessed it but were expected to exercise it; the power of making

absolutely new laws, statutes which did not exist before as law, either by the common law or by the custom of the people. It is true, our ancestors had some taste of radical legislation during the Revolution, and the checks of the State constitutions were adopted for that reason; but subject only to this limitation, it was the first modern experiment in popular legislation. The great wave of radical law-making that began with the moral movements—the prohibition movement, the anti-slavery movement, and the women's rights movement—of the second quarter of the nineteenth century, lasted down until the Civil War. After that there was a conservative reaction, followed by a new radical wave in reconstruction times, which ended with another conservative reaction at the time of the first election of President Cleveland. Since then, new moral or social movements, mainly those concerned with the desire to benefit labor and repress the trusts, with the desire to protect women and children, seem to have brought up a new radical wave, the progress of which has hardly ended yet. Before the Civil War, the women's rights movement and the anti-slavery movement always worked together. They were in great part composed of the same persons. In fact, the historical origin of the women's suffrage movement was a large abolition meeting held in England, but attended by many women delegates from America, where they excluded a leading American woman abolitionist and would only allow her husband to take her seat in her place. We shall, of course, consider this precise question later, and pause now merely to note the fact that with the anti-slavery movement, ending with the adoption of the war amendments and the women's suffrage movement, ceasing to progress soon after, there came the period of conservative reaction, or, at least, of quiescence, which lasted down to the recent labor and social movements that have caused our increasing mass of constructive legislation in the last few years. It is true that some of the far Western Territories adopted women's suffrage soon after

being made States, or at the time they were admitted; but no other State, even of those surrounding them, has followed their example, though the people have repeatedly voted on the point. Whatever progress the cause may have made in England, or in the larger cities of the East, I think that no unprejudiced observer would say that it looks so near to accomplishment as it did in the twenty years preceding the Civil War. Then, also, there was during the same decades a great increase in personal property; that is to say, in corporate stocks and bonds, the kind of property most easily attacked by legislation; but the very possession of such securities by large numbers of the people tended to make them more conservative in ordinary property matters. It is in the times when you have but farmers on the one side, as in the Shay Rebellion in Massachusetts after the Revolution, or when the proletariat on the one side is opposed to the bourgeoisie on the other, as in certain Continental countries, that you find radical legislation. We were fortunate in that a large number of our citizens were thus arrayed on both sides of the question. Property rights, of course, have been granted to women most completely throughout the Union, but in twenty years they have made little progress toward the vote.

Blackstone says that democracy is peculiarly fitted to the making of laws, and calls attention to the importance of legislation, with the regret that there should be no other state of life, arts, or science, in which no preliminary instruction is looked upon as requisite; but by "democracy" Blackstone really meant representative government, which still acts quite differently from the referendum and the initiative. Democracies, he says, are usually the best calculated to direct the end of a law. But in no sense, says Professor Jenks, was the British Parliament the result of a democracy; while our State legislatures during the Revolution were, indeed, democratic, and practically omnipotent, and for that very reason were promptly curbed by the State constitutions,

which were adopted even before the Federal. And of late the distrust of our legislatures is shown by the most exaggerated list of restrictions we find placed upon them in the newer constitutions of the Southern and Western States. Another thing Blackstone oddly says, is that in legislation by the people they will show great caution in making new laws that may interfere with their rights and liberties. Precisely the contrary is experienced. Nobody is so willing to interfere with the rights or liberties of the people as the people themselves, or their supposed representatives in the legislature; and a body or faction of the people is far more ready and reckless to impose its will upon the others than have been the most masterful English monarchs.

The recklessness of legislatures has two or three most evil consequences. They pass foolish or unconstitutional laws, relying on the governor to veto them, or the courts to declare them void—which has the effect of shirking their responsibility and imposing unjust and obnoxious duties on the other branches of government, to which they do not fairly belong; increases the growing disrespect for all law, and deteriorates the moral and intellectual fibre of the legislature itself. Finally, also, it provokes that hypertrophic modern State constitution of the South and West, which tries to bind down future legislatures in infinite particulars, thereby again diminishing their importance and responsibility, making it more difficult to get able men to serve in them, and, by the frequent necessary amendment of State constitutions, resulting in a continual referendum, which nearly does away with representative government itself.

Moreover, when a law is unconstitutional it should ever be only because it violates some great natural right of humanity, personal liberty, property, or the right to common law. When constitutions go into details which are not substantially connected with these cardinal rights, they bring themselves into contempt, and justify the growing prejudice of our labor leaders against them. The people should believe, as I

think they do believe under the Federal Constitution and under the older ones of the States, that when a law is declared *no* law by a high court for being counter to the higher will of the people as expressed in their permanent constitution, it is not on a technicality, but because some great liberty right is infringed by it. Yet it is a curious thing that whereas our people only got the power to legislate by democratic assemblies freely and completely from the year 1776, in hardly more than a hundred years after their conscious possession of that power we find a respectably strong popular movement attempting to reverse it, or, at least, to limit its field. Most of our advocates of direct legislation by the people assume that a great mass of law-making would result in practice; probably the contrary is true; the referendum would destroy more than the initiative would create. They would go back to a condition of things which, in theory at least, existed in the England of the early Saxon times; although, of course, in those days only the freemen, and no women, had the law-making vote. Anyhow, it is curious that that representative government upon which we have been priding ourselves as the one great Anglo-Saxon political invention should be precisely the thing that we are now urged to give up. In the *Federalist* there is much discussion as to whether it is possible to have so big a democracy as the United States, and the answer made by Hamilton was, "Yes, because we shall have representative government." But detailed discussion of the initiative we must leave for a later chapter.

Perhaps we begin to detect the prejudice in the general mind, which is notable in the works of a few earlier theorists, to prefer statute law to what is known as judge-made law, on that ground alone. The writer is not of the school that admits there is such a thing as judge-made law, but believes the phrase to be a misnomer, at least in ninety-nine cases out of a hundred. The whole theory of the English law is that it exists in and by the people and is known of them before it is announced by a judge, and although the extreme of this

theory be somewhat metaphysical, it is certainly true that a judge is a very bad judge who does not decide a point of law apparently new or doubtful according to the entire body of English-American precedent, experience, rather than by his own way of looking at things. If judges really made new law, particularly if they made it consciously, it would be more than "aristocratic"—it would be simply tyrannical, and, of course, be unconstitutional as well as being an interference with the legislative branch of government. But it is doubtless this theory, that it is the statute law that is the democratic kind, which has given form and body to the vast mass of statutes we are here to consider. Certain of our legislators seem to be horrified when a court applies a precedent a hundred years old, still more when it is a thousand years old, although to the jurist, in most cases at least, if never since questioned and never grown obsolete, it is entitled to all the more respect for that reason. Both the labor interests and the "special interests" resent excessively the recent tendency of intelligent judges to look at precedent and history. Mr. Debs will tell you that such matters are aristocratic and reactionary; Mr. Rockefeller, or his lawyer, that they are both visionary and obsolete. Yet a statute may only represent the sudden will of a small body of mediocre intelligence on a new subject (or an old one) which they have never studied. It is true that if they make a mistake they can amend it to-morrow; but so, also, may be amended the decisions of the court.

VII

AMERICAN LEGISLATION ON PROPERTY RIGHTS

When we come to the vast field of legislation in the United States, comprising the law-making of forty-six States, two Territories, the National Congress, and the Federal District, it is difficult to decide how to divide the subject so as to make it manageable. The division made by State codes and revisions, and the United States Revised Statutes, hardly suits our purpose, for it is made rather for lawyers than sociologists or students in comparative legislation. The division made by the valuable "Year Book of Legislation," published by the New York State Library, comprises some twenty subjects: Constitutional Law; Organic Law; Citizenship and Civil Rights; Elections; Criminal Law; Civil Law; Property and Contracts; Torts; Family; Corporations; Combinations and Monopolies; Procedure; Finance; Public Order; Health and Safety; Land and Waters; Transportation; Commerce and Industry; Banking; Insurance; Navigation and Waterways; Agriculture; Game and Fish; Mines and Mining; Labor; Charities; Education; Military Matters; and Local Government. This division, however convenient in practice, crosscuts the various fields of legislation as divided in any logical manner. The same criticism may be applied to a somewhat simpler division I have used in tabulating State legislation for the last twenty years into thirteen columns, the titles of these being, roughly speaking, Property and Taxation; Regulation of Trades and Commercial Law; Personal Liberty and Civil Rights; Labor; Criminal Law, Health and Morality; Government; Elections and

Voting; Courts and Procedure; Militia and Military Law; Women, Children, Marriage and Divorce; Charities, Education, Religion and Jails; Agriculture, Mining and Forestry; Corporations, Trusts and Interstate Commerce. Is it not possible to begin with a broader and more simple division?

Now, all statutes are limitations on a state of pure individualism, defining this latter word to mean a state of society recognizing personal liberty and private property, and allowing all possible freedom of action and contract relating thereto; with a court administration for the purpose of protecting such liberty and enforcing such contracts in the courts. The usual rough division of our constitutional rights, following the phraseology of the Fourteenth Amendment, is that of life, liberty, and property; but the rights to life and liberty obviously belong to the same broad field. Our first division, therefore, may well be that which divides life and liberty rights from property rights; although in some cases, notably in the earnings of labor, they would be found to run together. Liberty rights are multifarious and indefinite; we may, therefore, first take the field of property as presenting, after all, a more simple subject. Considering all possible organizations of human society from this point of view, we shall find that all may be expressed, all at least that have hitherto been conceived, under the systems of anarchism, individualism, and socialism, these words expressing all possible states of human society when expressed in terms of individual liberty, that is to say, the free exercise of the individual will. Either one of these may exist either with or without the notion of private property; though, of course, one's action as to property would be controlled under a system of socialism, and property itself would have no legal protection under a system of anarchism. Nevertheless, the notion of property might still exist and be recognized by the custom of mankind without any sanction or enforcement from the entire community, *i. e.*, what people call the state. When we are speaking in terms of property, we use the word *communism*—meaning

that state of society where the conception of property exists, but the law or custom will not recognize individualism. Communism, therefore, usually implies ownership by the entire community, while in anarchism there is no property at all. There has been much confusion in the use of these terms in the popular mind, and even in ordinary writing. Many people have confounded, for instance, socialism with anarchism or nihilism, when the two things are whole poles apart. In the same manner, communism has been confounded with socialism, although the term should be used in entirely different connections—communism when we are speaking in terms of property, socialism when we are speaking in terms of individual liberty. The word *individualism* was used by the present writer in a series of articles entitled "The Ethics of Democracy," beginning in 1887, as the most convenient term for describing that state of society where the greatest possible individual liberty is conjoined with a strong recognition of the right of private property, substantially the *laissez faire* school as it existed in England in the first half of the last century; "the distinction between communistic and socialistic laws being, that the former are concerned solely with the taking or redistribution of money or property; the latter regulate or prohibit men's mode of life, acts, or contracts, either among themselves or as concerning the state." [1]

Now, property is but the creature of law; and that is to say, in those of our States which have no common law, of statute. Jurists and communists are alike agreed on this. "Property is robbery," said Proudhon; property is but the creature of law, all English jurists admit. It is, of course, possible to conceive of a social system which recognizes no right of property, or one which makes all property belong to the community, or a middle ground which admits the institution, but holds that every individual holds property subject to the state's, that is, the organized community's, regula-

[1] *Scribner's Magazine*, vol. XV, p. 653.

tion and control. A convenient term for this state of affairs to which, perhaps, in our statutes, we are approaching, is "allowable *socialism*"; private property is recognized, but its use is regulated. In England they call it "gas-and-water socialism"; but this term, though picturesque, is not sufficiently comprehensive, relating, as it does, only to municipal activities. There is a third variety, the latest and perhaps the most intelligent of all, that believed in by leading modern German and American socialists, which we will call nationalism—the nationalization or municipalization of productive industry—the science of this doctrine being that private property may exist in all personal belongings, articles of pleasure, or domestic necessity, but not in lands, mines, works, or other instrumentalities used for the further production of wealth.

Whatever the future may bring, we must start with the institution of private property recognized to its fullest extent. It is expressly guaranteed in our Federal Constitution, as for the matter of that it was also in Magna Charta, as clearly as the right to liberty, and usually in the very same clause. Not only that, but when we adopted our first State constitutions, from 1776 to 1788, and the Federal Constitution in 1789, every one of them made express guarantee of this right. One or two, following the lead of Massachusetts and Virginia, recognized equality also, or, at least, equality by birth and before the law; but without exception property was expressly recognized as one of two leading constitutional rights, and even in some States, like Virginia, it was termed a natural right. The same thing is true of the Massachusetts Bill of Rights and in the Federal Fifth Amendment, though it is significant that the Declaration of Independence omits the word *property*, and only mentions among unalienable rights, life, liberty, and the pursuit of happiness—which some courts have held to include private property.[1] Never-

[1] Justice Brewer, in the *Yale Law Review*, for June, 1891. He holds that under "the pursuit of happiness" comes the acquisition, possession, and

theless, under our constitutions to-day, the right is not only doubly, but even triply, guaranteed; that is to say, by all State constitutions against State action; by the Federal Constitution against national action; and finally, by the Federal government in the Fourteenth Amendment as against State action also. This is the reason why, in any case affecting a cardinal liberty or property right, a litigant may carry his case not only through the State courts, which have sole jurisdiction of ordinary business and domestic matters, but to the courts of the United States as well.

When we come to legislation on the subject, or to modern State constitutions, there is hardly a change in this particular. Naturally, we find no new legislation confirming the right of property abstractly, or restating that that institution is part of our civilization. There is but one significant exception to this statement. While most of the States in their constitutions declare that men have a natural right to acquire, possess, and protect property, and Kentucky and Arkansas go to the length of saying that the right of property is "before and higher than any constitutional sanction"—which latter statement is a legal hyperbole—Oklahoma in its recent constitution, North Carolina, and Missouri state only that men have a natural right to the enjoyment of the fruits of their own labor; on the other hand there are recent intimations coming from Federal sources that individualism or private property rights, at least, and not anarchism or socialism, are part of our constitutional system. Before 1907 a Texas district judge refused to naturalize an immigrant on the ground that he was a socialist and that socialism was inconsistent with the Federal Constitution; and in that year Congress passed an act to regulate all immigration of aliens, which excludes, among other classes, persons who believe in

enjoyment of property, and that they are matters which even government cannot forbid nor destroy. That, except in punishment for crime, no man's property can be taken without just compensation, and he closes: "Instead of saying that all private property is held at the mercy of the public, it is a higher truth that all rights of the state in the property of the individual are at the expense of the people."

or advocate the overthrow by force or violence of the government of the United States or of all government, or of all forms of law—a definition which would exclude anarchists, but not socialists; and in the case of South Carolina *v.* United States (199 U. S. 437), the Supreme Court of the United States gave serious consideration to the question whether State socialism was compatible with a republican form of government. This is all, so far as I am aware, that a century and a half of legislation has given us affirming the abstract right of property, though there are several constructive statutes and constitutional provisions applied to the general right to trade or labor, which we shall consider when we come to that subject.

When a right is expressly guaranteed by the Constitution, we need ordinarily have no affirmative legislation about it. Liberty and property being always guaranteed by the State constitutions, it has not been necessary for the States to legislate to protect them.

Our study of this subject, therefore, will be confined to the restrictive or limiting legislation affecting private property or property rights, and of this we shall find plenty. Now there are four, and only four, methods by which the state, that is to say, American society as organized into governments, interferes with the right to property or the enjoyment and use thereof; that is to say, taxation, which is, of course, general; eminent domain, a peculiarly American doctrine; the police power; and the regulation of rates and charges. Some authorities place the last under the police power; but it does not seem to me that it historically, if logically, belongs there.

Starting with the simplest first—eminent domain, an American doctrine which, in its simplest form, subjects the land of any one to the need of the state or, in cases authorized by the Federal Constitution, of the nation. It is questionable whether it applies to personal property. It is an American doctrine, for in England where the king remained in theory the feudal over-lord, it was not necessary for him or the

sovereign Parliament, wishing to take or control land, and having no constitution protecting property rights against such action, to invent any new doctrine; but with us all land is allodial. The old charters of the original States creating tenures in free and common socage are, of course, obsolete. Everybody is a freeholder, and the States are not, still less the Federal government, a feudal over-lord. Nevertheless, the property of every one must be subject to the supreme common necessity; and the right is absolute in the States, although limited in the national government by the Federal Constitution. It is an American constitutional principle; and this principle also provides, as does Magna Charta and the early charters of England as to *personal* property seized by royal purveyors, that full damages must be paid; and to this general principle our constitutions have added that the damages must be paid at the time of the taking and the amount be determined by due process of law; that is to say, in most cases by a jury. Blackstone says: "So great is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community";[1] a new road, for instance, cannot be made without consent of the owner of the land, and the words "eminent domain" do not appear in the text of his book. But though we hold the contrary doctrine, the rights of the property owner are sufficiently protected when the taking is directed by the State, or even by a city or town. The menace to property here, with the increasing bulk of legislation, comes in the number of *new* uses, not only directly for the State or for cities and towns, but for public-service corporations, or often other private corporations, and associations of persons, who are permitted by legislation to take land under eminent domain, or, what is often worse, to acquire easements over it. Most of the States give damages for land not actually taken, but damaged, though our Federal courts have not held this to be necessary under the Fourteenth Amendment; but although land can still, in theory, only be taken for a public

[1] Book I, p. 139.

use, the number of uses which our legislation makes public is being enormously increased. The usual national purposes are forts, magazines, arsenals, dockyards, and other needful buildings. Independent of some express permission in the Constitution, the Federal government has no power to take, or even to own, land at all within the State limits. Therefore, it is questioned whether land may be taken for national parks or forest reservations except in the Territories, where title still remains with the Federal government. But the State's power of eminent domain is unlimited, although it began only with the towns or counties taking roads for highways, and cities and towns appropriating lands for schools and other public buildings. Probably the only serious addition of a wholly public use is covered by the general expression, parks and playgrounds; but the analogy of the highway led to the taking of land under eminent domain for railroads, when they were first invented, then for street railways, then for telegraph, telephone, and electric-light lines, underground pipe-lines or conduits of all sorts, and finally, for drains, sewerage districts, public, and often private irrigation purposes. Most of the more complex State constitutions define at great length to the extent of some twenty or thirty paragraphs just what purposes shall be considered a public use under eminent domain. In the absence of such definition, or without such definition, the number of such uses is being enormously increased by statute. Thus, reservoirs, storage basins, irrigation canals, ditches, flumes, and pipes for water drainage, or mining purposes, working mines, as dumps, hoists, shafts, tunnels, are made a public use by the constitutions of the arid States, Idaho and Wyoming. So as to water only in Montana, but in Idaho also to any other use "necessary for the complete development of the material resources of the State or the preservation of the health of its inhabitants." [1] And even by private parties, land may be

[1] These provisions are collated in "Federal and State Constitutions," p. 159.

taken for ways of necessity in many States, and for drains, flumes, and aqueducts by the constitutions of the arid States.

At common law, of course, a man or a set of men, who happen to be neighbors, would have had no right to take my land for a private way, or for drainage or irrigation purposes, however beneficial to their land; still less to take water from my stream across my land to their fields. But this precise thing can be done in an increasing number of States, although it has been held unconstitutional in the courts of one or two of the far Western States, and has even yet not been decided by the Supreme Court of the United States as to the powers of the Federal government. Under the broad definition given in Idaho and Wyoming, you can probably take land to establish a municipal coal-yard, or dispensary, or anything else that the legislature might suppose to be for the general health or benefit of the people. Yet a hotel company would not, as yet, be considered a public use, nor, probably, a private recreation park. And land taken for one use may be subjected to other and totally distinct uses without giving any new right of damages, as was decided in Massachusetts, at least, when land given or taken for an ordinary city street was afterward occupied by a steam railroad. A notable limitation on the use of streets, however, we find imposed by the statutes of New York and many other States, which provide that no railway shall be placed therein without the consent of a majority of the property owners or abutters. There is frequent legislation providing that the betterment taxes collected in case of public improvement shall not exceed the damages given for the property actually taken. In the last two or three years there has been an extension of the doctrine, authorizing cities and towns to take more land than is actually needed, for the purpose of convenience, or in order to get a better bargain, and then sell the surplus; but such laws may be unconstitutional.

Land may, of course, be taken for all municipal purposes, including public squares or parks, playgrounds, reforma-

tories and penal institutions, levees, ditches, drains, and for cemeteries; and the right is being granted to private companies other than those above mentioned, in Colorado, to tunnel, transportation, electric power, and aërial tramway companies; in North Carolina to flume companies; in many States for private irrigation districts; in the West generally to mining or quarrying companies; in West Virginia and other States to electric power, light, or gas companies; while in North Carolina, Washington, and Wisconsin, we find the dangerous grant of this great power to electric-power companies, which are, in Wisconsin at least, expressly permitted to flood lands by right of eminent domain in order to form ponds for power purposes. It is easy to see that under such legislation everybody holds his land not only subject to public need, but to the greed of any designing neighbor. Perhaps the most important question of eminent domain is or was whether it authorized general schemes of internal improvement made by the State or by a municipality, or, worse still, by a private corporation chartered for the purpose. The Constitution of Michigan, with those of the Dakotas and Wyoming, provides that the State cannot be interested in works of internal improvement, nor, in North Dakota and Wyoming, engage in them except on two-thirds vote of the people; nor, in Alabama, may it loan its credit in support of such works; nor, also, in Maryland, Minnesota, Ohio, and Wisconsin, create or contract debts for them; nor, in Kansas and Michigan again, be a party to carrying on such works. But the Tennessee Constitution declares that a well-regulated system of internal improvement should be encouraged by the legislature. So, in Virginia, no town or county may become a party to any work of internal improvement except roads, and they are frequently forbidden from borrowing money for such purposes. There is, therefore, considerable constitutional check to legislation in this direction.[1]

[1] See "Federal and State Constitutions," book III, secs. 92, 324, 345, 370, 391, and 395.

Taxation, of course, has from all time been the universal limitation upon property rights, though it is important to remember that until the present budget there has not in modern times been an attempt at direct taxation of the capital value of land in England; Cobbett records many "aids" of a few shillings per hide of land in Anglo-Norman times. The earliest taxation was the feudal aids imposed purely for defensive purposes, for building forts and bridges; later for foreign wars or crusades. We have traced the origin of the scutage tax as a substitute for military service and the two great constitutional principles that all taxation must be with the common consent of the realm; that is to say, of Parliament, later of the House of Commons; and must also and equally be for the common benefit. Theorists have argued, particularly with us, that under the latter principle protective tariffs are unconstitutional; but even if it be admitted that they are not for the benefit of the whole people, the exception is as old as the rule; protective tariff laws, and, earlier still, laws absolutely prohibitive of importation, being plentiful on the English statute-books before and at the time this earliest of constitutional principles appeared. There is a step beyond the protective tariffs, however, which is naturally mentioned in this connection, and that is the bounty—sums of money paid to certain interests and derived from the general taxes fund. Under the Acts of Congress there has been, I think, only one instance of a bounty; that is in the case of the Louisiana sugar-growers. In State legislation it has been a little more usual. Foreign countries, notably Germany and France, as to beet sugar, etc., have been in the habit of giving bounties. This precedent undoubtedly suggested it; but these countries do not enjoy our constitutional principles. There has hardly been a direct decision on the constitutionality of the Federal bounty, but as to State bounties we find several, with an increasing tendency to hold void such laws. There can be no question that they are utterly against our whole constitutional system. The

Supreme Court, when considering sugar-bounty laws, seems to have thought that it might be sustained as a compensation made for a moral obligation, the Louisiana planters having been led into industries from which the protection was suddenly removed; of such nature must be the justification, if any, for bounties given in times of flood, fire, or public disaster, which, however, are really sustained only in the absence of objection and on the principle *lex non curat de minimis*. The most insidious form of the bounty, however, is that of exemption from taxation, or, still worse, granting subsidies or subscribing to the stock and bonds of public-service, or even ordinary private, corporations. Undoubtedly the exception has been established in the case of railroads. The granting of State, city, or county aid to railroads has existed almost from their invention, probably on the analogy of highways; at all events, it is too late to be constitutionally questioned now. The exemption from taxation of private profitable enterprises, such as mills or factories, is less defensible. Frequently, however, they go without question, it being to no one's particular interest to do so. The usual subjects of State bounties were, in 1890, beet-root sugar, binding twine, iron and iron pipe, potato starch, and rope, with tax exemptions to Portland-cement works. Ramie fibre continued a favorite subject of bounty for some years, with seed distributions to farmers, which were in some States held unconstitutional. In 1896 Utah gave a bounty on canaigre leather and silk culture. There was an exemption on salt plants in Michigan, but beet sugar continued the favorite beneficiary. There has been a reaction against bounty legislation of recent years. In 1908, for instance, New York repealed its bounty on beet sugar, and it may be hoped, with greater intelligence of constitutional principles, that all such legislation will be abandoned.

Coming to matters of ordinary taxation, of course the first thing to note is its extraordinary extent. In direct taxation it is not an unfair estimate to say that the States and their

municipal organizations undertake to impose an annual assessment on real and personal property which would average at least two per cent. throughout the country; amounting to from one-third to one-half of the income derived therefrom. In indirect taxation, duties, and revenue taxes, a sum far greater is taken from the average household. One might very much wish that the individual householder might at least know how large a sum is thus taken from his earnings annually, for it is safe to say that in no civilized country, not even in the France before the Revolution, was individual taxation anything like so heavy. Therefore, we are beginning to find legislation, even constitutional provisions, carefully limiting the tax rate. The amount of the State tax is thus limited in probably half the States, mostly Southern or Western, and nearly all of them limit also the amount of taxation to be imposed by the counties, cities, towns, school districts, or for other special purposes. In the North-eastern States such limitation is not usual, though in Massachusetts and New York it exists as to certain cities. It may properly be said of such legislation that it does not appear to be so futile as one might have expected. There is, of course, a tendency to raise the limit, involving frequent constitutional amendment, or, in Massachusetts, for instance, where the limitation is put on only by statutes, by later statutes authorizing the borrowing outside of the debt limit; for it should be said that such limitations do usually apply both to the appropriations and to the funded indebtedness incurred. Still I have not observed in the last twenty years any repeal of such laws or constitutional provisions, but rather an increasing number of States adopting them, from which it may be inferred that they work satisfactorily. Nearly all the States purport to tax the capital value of both real and personal property, not, as in England, rents or incomes; and they tax "tangibles" and also "intangibles." That is to say, they undertake to tax stocks or bonds or mortgage debts; the evidence of property, as well as the property itself; and

the debt as well as the property securing it. Some States, such as Pennsylvania, impose a smaller, more nominal, tax upon stocks and bonds in the hands of the owner, for the sake of getting a larger return, but in many States, such as Massachusetts, this legislation would be unconstitutional, as not proportional taxation.

There is a mass of legislation every year directed to the assessing and collecting of taxes, tending more and more to become inquisitorial, requiring the tax payer under oath to furnish full schedules of his property, with provision for an arbitrary assessment if he fails to do so. One effect of this has been to drive very wealthy men from Ohio or other Western States to a legal residence in the East, where the laws are more lenient, or their enforcement more lax. The problem is a most important one and I see no signs yet of any solution in the increasing mass of legislation one finds upon this subject every year. It is to be noted—what our socialist friends have never seemed to observe—that just in so far as a man's earnings or income are taken from him in the form of taxation, you are already in a state of socialism. That is to say, to that extent is his income taken from him and administered by the state. This is an observation most unwelcome to the opponents of capitalism, so-called, who resent the conclusion that if the State and Federal governments are already taking forty per cent. of his income from him, a state of perfect socialism could do no more than take the other sixty per cent. This whole problem of taxation, indeed, is evaded at present only by the miserable solution of fraud; hardly any one, except the non-propertied classes, paying what the law purports to take from them; and the non-propertied classes only pay it because their taxation, being indirect, is paid for them by others.

Coming to other forms of taxation, we may distinguish three: Income, succession, and license. Income taxation in England dates, it is said, from 1435; but (in the shape of tithes) it is far older. The power of income taxation (except

upon earnings and profits) belongs here only to the States; just as the sole power of imposing duties on imports is given to the Federal government. Many of the States impose an income tax, but I observe no particular increase in that kind of taxation in the legislation of the last twenty years. A man's income is commonly taxed with his other property. It is a form of tax far more evaded here than in England, probably because the English law provides a machinery for collecting a large part of income taxation from the persons from whom the income is derived, as, for instance, from the tenant who pays rent to a landlord; just as with us a corporation is made to pay the tax on its capital stock nominally due from the individual owner. The only notable extension of income tax legislation is in the establishment of the principle of the *graded* income tax, which is beginning to be adopted in a few States, as in North and South Carolina in 1897.

This principle of graduated taxation has, however, been nearly universal in our next and more modern variety—the succession tax. The old English precedents are the "aids" and fines for alienation. But beginning here about 1893, this form of taxation has now been adopted by nearly all the States, the amount of the tax being graded both according to the relation of the inheritors to the person from whom the succession is derived, and according to the amount of the inheritance itself; the rate of the tax thus varying all the way from an absolute exemption, as to the wife or children, to a tax as high as twenty-five per cent. (in New York) in the case of large estates going to remote relatives. The Federal inheritance tax imposed at the time of the Spanish war was soon repealed, and this domain of taxation, with the income tax, is now almost universally employed by the States. The principle itself can hardly be carried much farther, but it will be necessary to have some understanding or arrangement between the States, whereby double or treble succession taxes are not imposed on the same estate, as

notably in the case of the stock or bonds of railroads chartered in several States, all of which may undertake to impose full succession taxes upon such stock. It has been held that succession taxes may be graded even in cases where a State constitution provides for proportionate taxation, the tax being an excise tax and not a direct property tax; but this is not so in respect to income taxes. We may assume therefore that income taxes must be equal in States which have this constitutional provision, although in one or two of them recent statutes have exempted a portion of the income of veterans of the Civil War. This might be sustained as a pension, pensions being for actual military service constitutional, and are in the Southern States expressly permitted to Confederate soldiers and their families—despite the implied prohibition of the Fourteenth Amendment.

The last form of taxation, that of an excise upon licenses or trades, is most usual in the South. An increasing number of trades are thus being taxed or regulated. Sometimes the taxation is put under the guise of a fee for examination and licensing, sometimes plainly as an excise tax. Undoubtedly such taxation is against all the history of our legislation demanding complete freedom of labor and trade. Nevertheless, it has not been held unconstitutional by the States except, of course, when touching a trade which is interstate commerce, though the *examination* occasionally has been. Such taxation has not yet become popular in the North, except definitely for the purpose of examination and license; but it is almost universal in the South, many States indeed providing by their constitution or laws that all trades and callings may be thus taxed. These taxes may be arbitrary in amount, but are sometimes graded according to the amount of business done. Such legislation has been sustained in so far as it is a tax or a license imposed for protecting the public health in a reasonable manner; thus, doctors, plumbers, nurses, dentists, etc., have been submitted to such regulation, but in the case of blacksmiths its constitution-

ality was in one State denied, and the law as to barbers in several States annulled. Nevertheless, it will always be a popular method of raising money in the poorer States, where land already bears its full burden and little personal property can be found.

Commissions of inquiry on this whole subject of taxation are continually being appointed—we have had two in Massachusetts in the past ten years—and their recommendations nearly always prove unacceptable. The probable scientific answer, that you must only tax property and not money or the evidence of property, and that if direct taxation thereby becomes too burdensome we must reduce our rate of expenditure, is a conclusion our legislators are yet unwilling to accept. The taxation of corporations presents a different problem and we shall therefore leave it for special consideration with that subject. The matter of betterment taxes may be dismissed with a word, as it is hardly, in theory, taxation at all, but rather using municipal agencies to collect the cost, or part of the cost, of a local work or benefit. It is, of course, closely connected with the subject of eminent domain. That is to say, only a public use, or at least a general local benefit, can justify a betterment tax. There is still considerable legislation on this matter, confined generally to the objects of securing a jury trial, or at least a public hearing, on the amount of the assessment, defining the purposes for which it may be imposed, as, for instance, paving, sewers, water-works where public, and—perhaps the most contested case of all—that of parks or pleasure-grounds; and providing that the amount of betterment taxes imposed shall not exceed one-half the value of the improvement of the property, and shall never exceed the amount paid as damages when part of the owner's land is taken.

By far the greatest mass of legislation relating to property is concerned with the police power and modern extensions thereof. It is also by far the most dangerous to property rights, and this for several reasons: firstly, it involves the

destruction of property without any compensation whatever, not upon payment of damages, as in the case of eminent domain; secondly, on account of the extraordinary extension by our modern legislation of this power to matters not hitherto deemed necessary for the safety, health, or even the well-being of the public, vague as the legal application of the last word is; thirdly, and perhaps most important, because the police power is usually exercised without any common-law guarantees, without process of law or jury trial, but by the arbitrary ruling of some board, or even single commissioner, and often, so far as the statute is concerned, without a jury or even an appeal from the commissioner's ruling to any court of law.

I believe this to be the most dangerous tendency that now confronts the American people—government by commission, tenfold more dangerous than "government by injunction." Not only is there no liberty, no appeal to common right and the courts, but all permanent "boards" tend to become narrow and pedantic or, worse, to be controlled by the works they are created to control.[1] The constitutionality of such boards is, of course, always questionable, but the tendency to create them is perhaps the most striking thing in modern American legislation. Not only do we find them in enormously increased numbers in all the States, but even a late President of the United States seriously recommended that the contracts and affairs of all corporations at least (and the bulk of modern business is done in corporate form) should be so submitted to the control or dictation, or even the nullification, of such an administrative board or commission, and this again with no appeal to the courts. So audacious an upsetting of all Anglo-Saxon ideas of the right to law, it may be said without exaggeration, has never been attempted

[1] Two singular instances happened only the past year: at common law any one may build railroads, and they are certainly for the general advantage whether profitable to the owners or not. Yet the railroad commissions of New York and Massachusetts have recently in each State prevented the building of most important lines, by responsible applicants—under the opposition of other railroads.

in the history of the English people, not even by the Stuart kings, who were most of all disposed to interfere in such particulars. Wiser counsels deterred the administration from insisting on this measure, but the fact that it could be brought up, and that with the approval of a large portion of the public, indicates how radical our legislation is getting to be in this particular.

It is a commonplace in the law that no court has defined, or ever will consent to define, the exact limits of this police power; suffice it to say that in the classic words of Chief Justice Shaw of Massachusetts, "it is all that makes for the health, safety, or comfort of the people." As to the health and safety, there can be little question; but when it comes to indefinite words like "comfort" or "well-being," too wide a field is left for the imagination. It has recently been decided that the æsthetic part of life does not necessarily concern the comfort or well-being of the people. That is to say, laws forbidding the use of land for the erection of hideous signs, or forbidding the height of buildings at an inartistic excess have been declared not to fall within the police power, but under eminent domain. So of statutes forbidding the taking of a man's picture, or a woman's portrait for advertising purposes, when not properly obtained; yet it may be questioned if any law is more certainly for the comfort of the persons concerned than such a statute. On the other hand, noisy or noxious trades, mosquito ponds, trees infected with moths, etc., sawdust in water, offensive smoke, and, in Vermont, signs, were all made nuisances by statute of one State or other in 1905 alone. The first historical instance, perhaps, of destruction of property under the police power was the blowing up of buildings to check a conflagration, a practice still common, although its utility was much questioned after the Boston fire, and which, at common law at least, gave the owner no right to compensation; but the more usual use of the police power until very recent years has been limited to the prohibition of offensive trades in certain localities, and

the suppression of public nuisances. Later, the prohibition of the manufacture of intoxicating or malt liquors, and the regulation of tenement houses at the orders of the Board of Health. This led to the regulation or prohibition of certain trades conducted in tenement houses or in sweat shops, and to other matters which we shall find it more convenient to consider under the head of labor legislation.

Whether there are any limits to this power is much discussed. There is no question that the power must not be arbitrary or utterly without reason, and of that reason the courts must and do in fact judge. Taking property for a purpose unjustified by the police power is, of course, taking property without due process of law. An arbitrary statute taking the property of *A* and giving it to *B*, or even to the public, without compensation has, from the time of Lord Coke himself, been the classic definition of an unjustifiable law and one which with us at least is unconstitutional; but our courts wisely refuse to judge if, when a proper police motive is disclosed in the statute, it is the *best* method of effecting the result. This, I think, is a clear statement of the principle of our court decisions. If, upon the face of the statute, the court can see no possible relation to the public health or safety, or, possibly, general welfare, it will hold the law null in so far as it invades either property or liberty rights because not under the police power. If, on the other hand, they can see *some* relation to the public health, safety, or general welfare, even though they do not think it the best method of bringing about the desired result, they will not presume to run counter to legislative opinion. Of the expediency of the statute, the legislature must be and is the final judge.

With us the police power is exercised largely for moral reasons. That is to say, the great instances of its extension have been connected with moral or sanitary reform. No doubt the police power may broaden with advancing civilization and more complex appliances and possibly greater

medical knowledge and social solidarity. No doubt purposes which were once lawful may be unlawful, and property devoted to them thus be destroyed by a change in the law. Mr. Justice Brewer, of our Supreme Court, holding the contrary view, was overruled by the majority, and that decision is final.[1] Not only we, but a State, may not even make a contract which shall be immune from future extension of the police power, the Dartmouth College case notwithstanding. For instance, the State of Massachusetts in 1827 granted a perpetual franchise to a corporation to make beer. It was allowed, forty years later, to pass a law that no corporation should make beer, and the brewery became valueless. The State of Minnesota granted a perpetual franchise to a railroad to fix its own fares. Twenty years later it took away that right, thereby, as claimed, making the railroad property valueless; the railroad had no remedy. A man in Connecticut had barrels of whiskey in a cellar for many years, but the State was allowed to pass a law prohibiting its sale; which, of course, had he been a teetotaler, would have deprived that property of all value, and in any case, of all exchange value. A man in Iowa owns one glass of whiskey for several years, and then a law is passed forbidding him to sell it; the law is valid. A youth in Nebraska buys tobacco and paper and rolls a cigarette. The State afterward passes a law forbidding smoking by minors. It is a crime if he light it. Sufficient has, perhaps, been said to show the extraordinary scope and elasticity of this, the widest, vaguest, and most dangerous domain of our modern legislation, though perhaps we should add one or two striking cases affecting personal liberty, as, for instance, a citizen of Pennsylvania marries his first cousin in Delaware and returns to Pennsylvania, where the marriage is void and he becomes guilty of a criminal offence; a white man in Massachusetts who marries a negress or mulatto may be guilty of the crime of miscegenation in other States; a woman might

[1] Mugler *v.* Kansas, 123 U. S. 623.

work fifty-eight hours a week in Rhode Island, but if she work over fifty-six in Massachusetts may involve her employer, as well as herself, in a penal offence.

The most valuable of all police legislation is, of course, that to protect public health and safety; and prominent in the legislation of the last twenty years are the laws to secure pure and wholesome food and drugs. Possibly "wholesome" is saying too much, for our legislative intelligence has not yet arrived at an understanding of the danger from cold storage or imperfectly canned food, though Canada and other English colonies have already legislated on the subject, to say nothing of our tariff war with Germany on the point. One may guess that ninety-nine per cent. of the present food of the American people, leaving out the farmers themselves, is of meat of animals which have been dead many months, if not years, and from vegetables which date at least many months back. It is nonsense to suppose that such food is equally wholesome with fresh food, or that there is not considerable risk of acute poisoning or a permanent impairment of the digestive system. Senator Stewart, of Nevada, has shown that nearly fifty per cent. of the soldiers of the Spanish War had permanent digestive trouble, as against less than three per cent. in the Civil War, which took place before cold-storage food was known, or canned food largely in use. It was hopeless for the States to act until there was Federal legislation on the subject, as the health authorities had no constitutional power over goods imported from other States; but the passage, under Roosevelt, of a national food and drugs act has given a great impetus to the reform, and by this writing more than half the States have passed pure-food laws, being usually, as they obviously should be, an exact copy of the Federal Act. Among the articles specially mentioned in such legislation we find candy, vinegar, meat, fertilizers, milk, butter, spices, sugar, cotton seed, formaldehyde, insecticide, and general provisions against adulteration, false coloring, the use of colors and preservatives, etc.

Going from matters merely unwholesome to actual poisons, the course of legislation on intoxicating liquors is too familiar to the reader to make it necessary to more than refer to it, with the general observation that in the North and East the tendency has been toward high licensing or careful regulation, always with local option; while in the West originally, and now in the South, the tendency is to absolute "State-wide" prohibition and even to express this principle in the constitution. How much this extreme measure is based on the racial question, in the South at least, is a matter of some debate; and the working of such laws everywhere from Maine to Georgia, of considerably more. One may hazard the guess that the wealthier classes have no difficulty in getting their liquor through interstate commerce, while the more disreputable classes succeed in getting it surreptitiously. Prohibition, therefore, if effective at all, is probably only effective among the respectable middle class where, perhaps, of all it is least needed. In the older States, at least in Massachusetts, there has been a decided tendency away from prohibition in the last twenty years, and even from local prohibition in the larger cities. Worcester, for instance, after being the largest prohibition city in the world, ceased to be so this year by the largest vote ever cast upon the question.

Whatever may be said of the strict prohibition of liquor dealing, no one can have any objection to such laws as applied to cocaine, opium, or other poisonous drugs, and we find statutes of this sort in increasing number; while the manufacture and sale of cigarettes to minors or even, in some States, their consumption, is strictly prohibited, under criminal penalty. Laws of a similar sort were aimed at oleomargarine when invented, but this probably not so much to protect the health of the people as the prosperity of the dairymen. The mass of such legislation has emerged from the scrutiny of the courts, State and Federal, with the general result that only such laws will be sustained as are aimed to prevent fraud; but the manufacture and sale of oleomargarine

under that name cannot be prohibited. Artificial coloring matter may be forbidden, but a New Hampshire law was not sustained which required all oleomargarine to be colored pink; so it may be guessed that the laws of those States which make criminal the sale or use of cigarettes to or by children "*apparently*" less than sixteen or eighteen, will hardly be sustained as a constitutional police measure; yet such laws existed in 1890, while the State of Washington in 1893 made the sale even of cigarette paper criminal.

Another important line of modern legislation consists in the subjecting of trades to a license for the purpose of *examination* (the tax feature has been discussed above). Such laws are constitutional when applied to a trade really relating to the public health, but as we have found above, blacksmithing is not such an one; when imposed merely for the purpose of raising revenue, such legislation is undoubtedly constitutional under our written constitutions, but opposed to historic English principles, which insisted for seven centuries of statute-making on the utmost liberty of trade. In a South American republic you have to get a concession before going into almost any business, even maintaining a shoe-shop, or a milk farm, which concession is, of course, often obtained by bribery or withheld for corrupt reasons. It is to be hoped that the citizens of our States will never find themselves in that predicament. Still, certain State constitutions, as that of South Carolina, provide absolutely that all trades may be made subject to a tax, and the tendency —particularly in the South—to raise revenue in this way is increasing by leaps and bounds. Among the trades already subjected to such licensing or taxing, we find doctors, of course, and properly, pharmacists, plumbers, pedlars, horseshoers, osteopaths, dentists, veterinary surgeons, accountants, bakers, junk dealers, coal dealers, optometrists, architects, barbers, commission merchants, embalmers, and nurses. Of course it is a motive to novel or irregular trades to secure a licensing law from the State, for the slight tax insures them

protection. This is the reason that we find common statutes allowing osteopaths, etc., to be licensed. So far as I have observed, there is no such statute as yet in any State applying to Christian Scientists.

Police regulation for the *safety* of the public is found nearly entirely in the laws regulating labor, factories, mines, or machinery, and will be accordingly treated in that connection. Laws protecting the public against fraud, which from earliest times has been a branch of police legislation, have been of late years numerous, principally in connection with the prohibition of dealing in futures or sales on margin, of sales of goods in bulk without due precautions and notice to creditors, of the issue of trading stamps or other device tending to mislead the public. Some States have prohibited department stores, but this legislation has been held unconstitutional, though the early English labor statutes forbidding to any person more than one trade or mystery will by the historical student be borne in mind. Usury laws, of course, are still frequent, but decreasing in number with the increasing modern tendency to allow freedom of contract in this as in other matters, except only to such persons as, for instance, pawn-brokers, who peculiarly require police regulation.

Coming to statutes which merely facilitate business as it now exists, by far the most important movement has been the successful work of the State Commissioners on Uniformity of Law in getting their negotiable instrument act passed in nearly all the States, and in several already their uniform law statute on sales, only recommended in 1907. Some progress has been made in getting a uniform standard of weights and measures, and there is an increasing tendency to prescribe specific weights and markings for packages—possibly unconstitutional legislation. Still more important as a change in previously existing law has been the increasing tendency to make documents other than bills and notes negotiable. Perhaps this is a matter which requires explanation to the lay reader.

The early Anglo-Saxon law could not conceive of ownership of property as distinct from possession, and to their simple minds, when ownership was once acquired it was impossible to divest the owner of his property by any symbolical delivery. Hence the very early statutes making fraudulent sales or conveyances of property without actual and visible change of possession. The notion of a symbol, a paper or writing, which should represent that property would probably have impressed them like a spell or charm in a child's fairy tale. Even theft with asportation could not alter property rights, even in favor of innocent purchasers, when the owner did not intend to part therewith. A moment's recollection of what is now perhaps the most familiar of Teutonic saga to the ordinary reader, the text of Wagner's "Ring of the Nibelung," will give ample evidence of that mental attitude. But the Oriental mind was far more subtile. To the Jews or Lombards we owe the discovery of that *bill of exchange*—the first of negotiable instruments, and the first historically to bring into our law the legal concept of a symbol of ownership which might be instantly transferred with an absolute change of title in the property thereby represented, and this either to a present transferee or to one far away. Thus, a simple bill of exchange might transfer the ownership in a pile of gold in a moment from a man in Venice to a man in London, thereby (if the law-merchant was respected) freeing the treasure itself from attack at the hands of the Venetian authorities. And not only was this change of ownership instantaneously effected by the transfer of some symbol or document representing it, but there also, and as a necessary part of the invention, grew up the doctrine that the transferee was relieved of any claims against the property at the hands of the previous owner. This is what we mean by negotiable; and it is essential that the precise meaning of the word should be understood if we are to understand the importance of this legislation. Even most business men have a very vague understanding of the difference between *negotiable* and *as-*

signable. Substantially all property and choses in action are assignable, except personal contracts; and in ordinary business many of them are assumed to be negotiable, such as bills of lading, warehouse receipts, trust receipts, or certificates of stock. Most brokers, or even bankers, assume that when they have a stock certificate duly endorsed to them by the owner mentioned on its face they have an absolute and unimpeachable title to the stock therein represented. Such, of course, is not the case except for recent statutes in a few States. To take a familiar example, and I can think of none better to show exactly the difference between a personal contract non-assignable, a document which is assignable, and one which is negotiable—a Harvard-Yale football ticket. If the ticket is issued by the management to a person under his name, with a condition that it shall be used by no one else, it is a contract non-assignable. If it is issued to him in the same manner, but with no provision against assignment or the use by another person, it would entitle such other person to whom the ticket was given to use the seat, but only under the title of the original holder; and if the assignment was later forbidden, or for other reasons the right recalled by the management, the holder would have no greater title to the seat; the contract is *assignable*, but not negotiable. The assignee takes it merely as standing in the place of the original holder and subject to all the equities between him and the management. If, for instance, the ticket were given him by fraud, the right to use it might be revoked and the transferee would have no greater right than the original holder. But if the ticket were *negotiable*, like a bank-note payable to bearer, the holder, not actually himself the thief, would have an absolute title to the seat without regard to anything that happened prior to his getting possession of the ticket.

Now it is obvious that it is for the enormous convenience of business to have business documents made negotiable. If a banker can loan on a bill of lading or a warehouse receipt,

or a trader can buy the same, or if a man can give a trust receipt to his banker agreeing that all his general shipments or stock in trade shall be the property of that banker until his debt is paid, it makes enormously for the rapid turning over of capital, and the extension of credit. Of course, an enormous proportion of business in the United States is conducted upon credit, and without the invention of the negotiable instrument those credits could not be secured without an actual delivery of the commodities intended to secure them. And the custom of business is to consider most such documents negotiable even when in fact they are not so. It is more than usual to loan money upon warehouse receipts, bills of lading, stock certificates or trust receipts of all descriptions, regardless of the question whether the law of the State makes them negotiable. Hence the very great tendency to make such instruments negotiable by statute; and I find many such laws, beginning in 1893 in North Carolina, as to warehouse receipts, while the Massachusetts statute concerning stock dates from 1884.

A reaction to the English common law is the statute, common in recent years, prohibiting sales in bulk. It appears to have been a growing custom for merchants, particularly retail merchants, when in financial difficulties to sell their entire stock in trade to some professional purchaser by a simple bill of sale without physical delivery. Nearly all States have adopted statutes against this practice, although in several they have been held unconstitutional. The feeling that they are dishonest is doubtless justified by the facts; but it may also be truly described as a reaction to the simpler English law as against Oriental innovations.

The descent of property throughout the United States is regulated by English common-law ideas. That is to say, there is no primogeniture, although in early colonial times the older son took a double portion; and there is, except in Louisiana, complete liberty of testamentary disposition, although in one or two other States there have been statutes

forbidding a man to dispose of all his estate to a charity within a short time previous to his death, to the prejudice at least of his direct heirs. The Code Napoleon, of course, limits testamentary disposition in favor of these latter, so in Louisiana, only half of a man's estate can be given away from his children or widow, and not more than three-fourths of his estate can be bequeathed to strangers or to charity, to the prejudice even of collateral heirs.

In matters of general business the usual lines of legislation have been the ordinary ones found in English history. That is to say, statutes of frauds, usury or interest laws, and other familiar matters. The only tendency one can note is a broad range of legislation devised in the interest of the debtor—not only liberal insolvency laws now superseded by the national bankruptcy act, which is still more liberal than the laws of the States preceding it, but statutes restricting or delaying foreclosure of mortgages, statutes exempting a substantial amount of property, implements of trade, agricultural articles, goods, land, or even money, from the claims of his creditors. The exemption of tools or implements of trade goes back to Magna Charta, it will be remembered, but the exemption of other articles is modern and American. There is probably, however, no subject which is so apt to be let alone by our legislatures as that of business law. Upon that subject, at least, they are fairly modest and inclined to think that the laws of business are known better by business men. Imprisonment for debt is, of course, absolutely abolished everywhere, and in most States a woman is not subject to personal arrest in civil process. The statutes prevailing throughout the country, which give special preference to claims for wages or even for material furnished by "material men," have already been noted. It may be broadly stated that the presumption is that such claims are everywhere a preferred debt to be paid out of the estate of the insolvent, living or dead, in preference to all claims except taxes.

The security of mortgages is very generally impaired by

legislation confining the creditor to only one remedy and delaying his possession under foreclosure. That is to say, in far Western States generally, he cannot take the land or other security, and at the same time sue the debtor in an action for debt for the amount due, or the deficiency. This, of course, makes of a mortgage a simple pledge. Moreover, with the practice of delaying possession under foreclosure, appointing receivers in the interest of the debtor, etc., he is in many States so delayed in getting possession of his security that by the time he acquires it he will find it burdened with overdue taxes and in a state of general dilapidation. We have already alluded to the practice in California of compelling the executor of a mortgage to submit himself to the jurisdiction of the local public administrator, which practically results in a sequestration of a considerable portion of the property. For all these reasons, many conservative lawyers in the East, at least, would not permit their clients to invest their money in mortgages in California, Minnesota, Washington, or the other States indulging in such legislation, and partly for this reason the rate of interest prevailing in mortgages is very much higher in the far West than it is in States east of the Missouri River.

The greatest mass of legislation is, of course, that upon mechanic's liens, which are burdensome to a degree that is vexatious, besides being subject to amendment almost every year. In a general way, no land-owner is free from liability for the debt of any person who has performed labor or furnished materials on the buildings placed upon the land, even without the knowledge or consent of the land-owner in some States, though in one or two instances, notably in California, such legislation has been carried to such an extreme as to make it unconstitutional.

The matter of nuisances has been already somewhat covered. Legislation extending the police power and declaring new forms or uses of property to be a nuisance is, of course, rapidly increasing in all States. The common-law nuisance

was usually a nuisance to the sense of smell or a danger to life, as, for instance, an unsanitary building or drain. Noise, that is to say, extreme noise, might also be a nuisance, and in England the interference with a man's right to light and air. Legislation is now eagerly desired in many States of this country to make in certain cases that which is a nuisance to the sense of sight also a legal nuisance, as, for instance, the posting of offensive bills on the fences, or the erection of huge advertising signs in parks or public highways. Such a law was, however, held unconstitutional in Massachusetts. There is some legislation against the blowing of steam whistles by locomotives, although I believe none against the morning whistle of factories, and some against the emission of black smoke in specified durations or quantities.

But perhaps the most important legislation affecting simple matters of business other than the line of statutes already mentioned, making new negotiable instruments and controlling the title of property by the possession of a bill of exchange, bill of lading, warehouse or trust receipt, are those statutes prohibiting the buying of "futures," or the enforcement of gambling contracts to buy or sell stocks or shares or other commodities without actual or intended change of possession, which we have necessarily referred to in our discussion of restraint of trade (chapter 4). There is a very decided tendency throughout the country, particularly in the South, to prohibit all buying or selling of futures, that is to say, of a crop not actually sold, or of any article where physical delivery is never intended, and it will be remembered we found plenty of precedent for such legislation in early English statutes. Gambling contracts may be forbidden only in specified places, such as stock exchanges; and the buying of futures may be specially permitted to favored persons, such as actual manufacturers intending to use the goods; and both such statutes will be held constitutional and not an undue interference with the liberty of contract. These matters were largely covered by the statutes of forestalling in early

times. Legislation more distinctly modern is that against sales in bulk, and against department stores; more striking still is the statute, already passed in Wisconsin and Virginia, forbidding all tips, commissions, or private advantages secured by any servant or agent in carrying on the business of his principal, his master, or the person with whom he deals; the statute even forbids a gratuity intentionally given directly from the one to the other. It is hard to see how the last clause of the law can be held constitutional, any more than the laws forbidding department stores, although such commissions may be forbidden to be given "unbeknownst."

Weights and measures are standardized by the Federal government, and to these standards the States in practice all conform, but the legal weight of a bushel or other measure of articles varies widely in the different States, and the State Commissioners on Uniformity of Law have tried in vain to get the matter generally regulated. At one time the weight of a barrel of potatoes in New York City was fourteen pounds more than it was in Hoboken, across the river. In Massachusetts the weight of a barrel of onions was increased two pounds to conform with the uniform law recommended to all the States by the commissioners; but a representative in the State Legislature coming from a locality of onion farms lost his seat in consequence, which inspired such terror in other members of the State Legislature that the uniform law was promptly repealed, the weight of the barrel of onions put back at the former figure, and this over the veto of the governor. It is needless to say that the whole value and object of the whole movement for uniformity is to have actual uniformity. That is to say, unless the lawyer or citizen reading the statute can be sure that it is uniform with the laws of all other States without taking the trouble to consult them, the reform has no value. But it has proved almost hopeless to get this through the brain of the average legislator. The uniform law upon bills and notes, indeed, already mentioned, is treated with more respect; because, as has been

said above, they regard that as a matter of business, and they have some respect for the expert knowledge of business affairs possessed by business men.

The licensing of trades might be made a very valuable line of legislation to prevent the fleecing of the ultimate consumer by the middleman. Our ancestors were of the opinion that the middleman, the regrator, was the source of all evils, and they were also of the opinion that any combination whatever to control the price of an article of food, or other human necessity, or to resell it elsewhere than at its actual market and at the proper time, was a conspiracy highly criminal and prejudicial to the English people; in both of which matters they were, in the writer's opinion, perfectly right, and far more wise than our modern delusion that "business"—that is to say, the making of a little more profit from the larger number of people—justifies everything. Now, at the time of the coal famine of 1903, Massachusetts passed a statute licensing dealers in coal; the law for the municipal coal-yard having been declared unconstitutional. The object of this statute was not to derive revenue or to restrict trade, but to regulate profits; and in particular to prevent the retail coal-dealers from combining to fix the price of coal themselves. Yet in spite of this legislation, the ice-dealers of Massachusetts only this year (1910) assembled in convention in Boston upon a call, widely advertised in the newspapers, that they were holding the assembly for that precise purpose, that is to say, to fix and control the price and the output of ice. They were, indeed, "malefactors of great wealth"; at least we may guess the latter, and the animus of a more intelligent precedent may some day hopefully be directed to such definite evils, of which our ancestors were well aware, rather than blindly running amuck at all. The coal-dealers in Boston, by the way, made the same argument that is always made, and was made at Athens in the grain combination of the third century B. C.—to wit, that they put up the prices in order to prevent other people buying all

the coal and speculating in it; but notwithstanding that showing of their altruistic motives, the secretary of state revoked the license of the coal company in question. The statute also forbade the charging extortionate prices, which, again, was a perfectly proper subject of legislation under the common law; but, unfortunately, was carelessly drawn, so that it resulted in a somewhat cloudy court opinion.

For the matter of uniform legislation the reader must be referred in general to reports of the National Commission. Their greatest achievement has been the code of the law of bills and notes just mentioned. Besides this they have just adopted a code on the law of sales, and they have recommended brief and uniform formalities as well as forms for the execution and acknowledgment of deeds and wills, and have very considerably improved the procedure in matters of divorce.

The best modern legislation concerning trade and business is, of course, that of the pure-food laws. The Federal law has certainly proved effective, although it is in danger of being repealed or emasculated in the interest of the "special interests"; most of the State laws simply copy it. Undoubtedly the laws should be identical in interstate commerce and in all the States; and this can only be done by voluntary uniform action.

VIII

REGULATION OF RATES AND PRICES

This, the last method of infringing upon absolute rights of property, has assumed such importance of recent years as to deserve and require a chapter by itself. The reader will remember what precedents we found for the fixing of prices, wages, and rates or tolls in England. It may be convenient for our purposes to use these three definite words to mean the three definite things—prices in the sense of prices of goods or commodities; wages the reward of labor or personal services; and rates (the English word is tolls) for the charges of what we should now term public-service corporations, or in old English law, franchises, or what our Supreme Court has termed "avocations affected with a public interest." The reader will remember that the attempted regulation of prices began early and was short-lived, dating from the Assize of Bread and Beer in 1266, to the Statute of Victuals of 1362, hardly a century, and even these two precedents are not really such, for the first only fixed the price of bread and beer according to the cost of wheat or barley, just as to-day we might conceivably fix the price of bread at some reasonable relation to the price of flour in Minneapolis, and as it was fixed in ancient Greece by the wholesale price of wheat at Athens [1]—not as it now is, from three to four times the cost of bread in London, although made out of the same flour shipped there from Minneapolis; and the two latest statutes expressly say that they fix the price by reason of the great

[1] For an actual report of an indictment and jury trial for forestalling and regrating wheat in the third century B. C., see Lysias's oration, translated by Dr. Frederic Earle Whitaker, in *Popular Science Monthly*, April, 1910.

dearness of such articles on account of the Black Death or plague, and the consequent scarcity of labor. Then the Statute of Laborers of 1349 provided that victuals should be sold only at reasonable prices, which apparently were to be fixed by the mayor. With these statutes the effort to fix prices by general statute disappeared from English civilization save, of course, as prices may be indirectly affected by laws against monopoly, engrossing, and restraint of trade; and local ordinances in towns continued probably for some time longer.

Legal regulation of *wages* lasted much longer in England; and has reappeared in very recent years, at least in the Australasian colonies, with a beginning of such legislation in Great Britain and Ireland and the State of New York. The first Statute of Laborers merely provides that the old wages and no more shall be given. The next year, however, in 1350, the exact rate of wages was fixed; and this lasted for more than two centuries, to the reign of Elizabeth, the so-called "great" Statute of Laborers consolidating all the previous ones. It is apt to be the case that when a statutory system has reached its full development it falls into disuse; and that is certainly the case here. There is no later statute in England until 1909 fixing directly or indirectly the rate of wages; and it may be doubted whether the justices of the peace continued to fix them for many years under the Statute of Elizabeth. More than three centuries were to go by before this principle reappeared in legislation or attempted legislation; but in Australia,[1] New Zealand,[2] and England [3] there has been recent legislation for a legally fixed rate of wages to be determined for practically all trades by a board of referees, consisting, as such boards usually do consist, of one member to represent capital, one to represent labor, and the third to represent the public or the state. As such third representa-

[1] So. Australia, 1906, no. 915; 1900, no. 752; Victoria, 1903, no. 1,857; 1905, no. 2,008.
[2] See New Zealand Law of 1900, no. 51; frequently amended since.
[3] 60 and 61 Victoria, c. 37, 9 Edward VII.

tive almost invariably votes on the side of the greatest number of voters, this practically makes a commission hardly impartial. The working of the system in New Zealand will be found discussed in the *Westminster Review* for January, 1910. There is an appeal to the courts from the rate of wages fixed by such commission; and it appears that out of four such appeals, in three the decision of the commission was confirmed, and in the fourth set aside; but the workingmen disregarded the judgment of the court and struck for a higher wage—contrary to the whole theory of such legislation, which is to *prevent* strikes. This strike succeeding, there has, therefore, been no case so far where the increasing rate of wages was checked by any appeal to the courts.

In the British Parliament last year (and the identical bill has been introduced in the State of New York under championship of the Consumers League, as applied to women and children), a bill was introduced,[1] not backed, however, by the government as such, although bearing the name of Lloyd-George, providing in effect that wages might be fixed in this manner in certain definite named trades, and also in such other trades as might be designated from time to time by the home secretary. The economic effect of such measures we are not to discuss. In the United States, except as to public work, they would be probably unconstitutional.

Coming, therefore, to public work, we use this phrase for all labor contributed directly to the State, to any county, city, town, village, or municipality thereof, to any municipal-owned public-service corporation, gas, water, etc., company, or, finally, and most important, to or under any contractor for the same, or any of them. Some years ago the State of New York adopted legislation to the effect that in all such public employment the wages paid should be the usual rate paid for similar work in the same locality at the same time. As a result of this legislation, many thousands of lawsuits were brought against the City of New York by persons who

[1] Since enacted; see below in chap. XI.

had done labor for that municipality in the past, complaining that they had not in fact been paid "the prevailing rate," although in fact the work had long since terminated, and they had been discharged, paid in full, and apparently satisfied. Shortly after, the law itself was declared unconstitutional by New York courts. Thereupon the labor interests proposed a constitutional amendment in 1905, to the effect that "the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, safety, and welfare of persons employed by the State or by any county, city, town, village, or other civil subdivision of the State, or by any contractor or subcontractor performing work, labor, or services for the State or for any city, county, town, village, or other civil division thereof." A very small proportion of the voters of New York took the trouble to vote upon this amendment, although it revolutionized the economic, if not the constitutional, system of the State, so far as property and contract rights are concerned; and it was adopted by a substantial majority. In Indiana there was a statute at one time fixing the rate of wages in public employment at a minimum of not less than fifteen cents per hour, but it was held unconstitutional. It is customary in New England villages to vote annually that the town shall pay its unskilled labor a prescribed rate for the following year, usually two dollars per day. The effect of this has been sometimes to cause the discharge of all but the very most skilful and able-bodied; of those who had, by working at less than full pay, been kept out of the poorhouse; and the selectmen of some towns, notably Plymouth, have refused to obey such a vote. The California Code of 1906 provides a minimum compensation of two dollars per day for public labor, except as to persons regularly employed in public institutions. Delaware has copied the New York statute as to the prevailing rate. Hawaii, in public labor, provides a minimum wage of one dollar and twenty-five cents per day. Nebraska goes further, and provides not only for two dollars

per day for public work, but that it must be done by union labor in cities of the first class, while Nevada has a minimum wage of three dollars and an eight-hour day for unskilled labor in public work. On the other hand, the Constitution of Louisiana prescribes that no law shall ever be passed fixing the price of manual labor.[1]

Coming lastly to *tolls*, or rates of persons or corporations enjoying a franchise, that is to say, a legalized monopoly, or exclusive legislation, or special privilege, such as eminent domain, or the right to occupy the streets; such are, in fact, identical with what we term public-service corporations, the older, the most universal, and certainly the most, if not the only, justifiable example of legal regulation of the returns for the use of property or personal services.

Whatever may be thought of the economic wisdom of attempting to regulate any rate or prices by law (and for a discussion of this subject as to railways, at least, the reader may well be referred to the valuable treatise of Mr. Hugo R. Meyer, "State Regulation of Railways"), such legislation was at least in England constitutional; but in this country, owing to our specific adoption of the principle of property rights and freedom of labor and hence of freedom of contract in our Federal and State constitutions, and as it has been repeatedly decided that to take away the income from property or a reasonable return for labor by legislation is to infringe on the property or liberty right itself, we have a universally recognized constitutional objection which has, in fact, made impossible all regulation of prices and wages, except as above mentioned, and as we are now about to discuss. The first attempt to regulate rates (with the possible exception of some early colonial laws) was the so-called Granger legislation, as shown in the Illinois Constitution of 1870, authorizing a warehouse commission to fix charges for elevating grain, the Act of Iowa of 1874 establishing reasonable maximum rates for railways, a similar act in

[1] This matter will be found further discussed in chap. XI.

Wisconsin of the same year relating to railroad, express, and telegraph companies, and in Minnesota; which legislation was all sustained by a divided opinion in the so-called Granger cases headed by Munn *v.* Illinois, 94 U. S. 113.

In the many years which have elapsed since this famous decision, the clouds have rolled away and the shape and basis of that apex of our jurisprudence been fairly surveyed. It will appear, I think, to any dispassionate jurist to have been rightly decided, at least as to the railroads, though the reasons given by Chief Justice Waite are unsatisfactory and have little logical basis. The true basis of regulation of rates at the common law and in English history was *monopoly ;* either a franchise directly granted by the crown, such as a bridge, ferry, or dock, or one which was geographically, at least, exclusive, like a dock without a franchise. As Lord Ellenborough said in the decision quoted by the Chief Justice himself: "Every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." *"If for a particular purpose the public have a right to resort to his premises"*—this important qualification from now on seems to have been lost sight of in the majority opinion. Quoting the early precedents such as that statute of William and Mary regulating the charges of common carriers—and our readers will remember many more—and the case of cabmen whose charges are regulated by city ordinances—but they are given stands or exclusive privileges in the streets—the chief justice concluded with the startling proposition that "if they do not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns." But the public has an interest, as was afterward pointed out in dissenting opinions, in the price of shoes; yet it has never been supposed that

that gave any power of legal regulation of factory prices. A still stronger case is that of inns or hotels, which have always been "a public avocation." They have had to take in all travellers without discrimination; yet there is not a vestige of legislation in the English statute-book regulating the prices to be charged by hotels. Indeed in early times most employments—millers, barbers, bakers—were public in the sense that the man could not refuse a job; yet their prices were never regulated. Yet it was upon this phrase, "*public employment*" or "*private property affected with a public interest*," taken from the opinion of Justice LeBlanc in the London Dock Company case, decided in 1810, without its context, that the chief justice built up the whole reason of his decision. The *decision* in Munn *v.* Illinois, subject to court review as to whether the rate be confiscatory, remains good law, but the *opinion* is still open to question; and indeed the most recent decisions of the Supreme Court show a desire to get away from it.

Some writers endeavor to justify, under our constitutions, the regulation of rates by the principle of eminent domain; but this source seems far-fetched and unnecessary. It is, of course, done under the police power; but the precedent for that use of the police power is to be found in the history of English law and statutes. Thus we have noted in the Statute of Westminster I, A. D. 1275, that excessive toll contrary to the common custom of the realm was forbidden in market towns. The very phraseology of this statute indicates the antiquity of the doctrine that tolls must be reasonable; but "toll" was always a technical term, not for ordinary prices of commodities, but for a use or service which was in some way dependent upon law or ordinance. In the very opinion of Chief Justice Waite, he quotes Lord Hale, saying that the king "has a right of franchise or privilege, that no man may set up a common ferry without a prescription time out of mind, or a charter from the king," and so later he quotes Lord Hale as saying that the same principle

applies to a public wharf "because they are the wharves only licensed by the king." We also found legislation fixing rents and so on in staple towns, and consequently of the charges of property owners therein, such towns having grant of a special privilege. The early law books are full of cases showing that discrimination and extortion were unlawful, even criminal, offences. And finally, as Chief Justice Waite points out, we find the rates of carriers fixed by law in 1691. Ordinary carriers, not having the right of eminent domain such as express companies, might to-day be considered to have no legal monopoly, and indeed, possibly for that reason, the regulation of charges of express companies has not yet been attempted; but in King William's time it was doubtless considered that the carriers had special privileges on the highways, as indeed they did.

It seems to me, therefore, that the real reason, both logical and historical, for regulation of rates rests on the fact that the person or corporation so regulated is given a monopoly or franchise by some law or ordinance, or at least a special privilege from the State; or at least that he maintains a wharf, a bridge, or a ferry, or other avocation which (really for the same reason) has, from time immemorial, been subject to such regulation. This, indeed, has been the doctrine officially adopted by the Commonwealth of Massachusetts in its legislation—"Where monopoly is permitted, State regulation is necessary." The new "Business" Corporation Act of 1903 makes the express distinction between public-service corporations and all other private corporations for gain: it applies to "all corporations . . . established for the purpose of carrying on business for profit . . . but not to . . . railroad or street railway company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways granted by the common-

wealth or by any county, city, or town." The implication is that such other corporations are not given the entire freedom of action and contract conferred by this Business Corporation Act. Where the State creates a monopoly, it puts the public at the mercy of the grantee of that franchise. Therefore, it is logical and just that it should regulate the rates. The test, however, is not and cannot be, that the man is ready to serve all comers, or even that he is compelled so to do; hotel-keepers, barbers, restaurants, doctors, etc., have never had their charges regulated by law. In early days most tradesmen were compelled to serve any and all, at an equal price, under liability for damages.[1] Mills, indeed, have always been subject to have their tolls regulated; at least, a certain proportion of the grist had to go to the miller; but even if it be held they had no peculiar franchise, the exception is as old as the rule.

It is further noteworthy that since the Granger cases themselves, there has been no extension of the doctrine of Chief Justice Waite to other trades or industries, while the extent of the doctrine, that is, the amount of regulation permissible under the Constitution, has been very much limited. Waite's opinion gives no intimation of any constitutional limit whatever, but dozens of the decisions of the Supreme Court since draw the limit this side of the point of confiscation; that is to say, at a "reasonable return," whatever that phrase may mean. It was, indeed, at first extended to semi-private grain elevators on the prairies, to elevators monopolizing the water front of Buffalo, New York, and to floating elevators in New York Harbor, the first and last of which show certainly no element of legal monopoly, while the Buffalo case at most only a geographical one. Still, elevators were the subject of Munn *v.* Illinois itself.[2] And it has never been extended to a mere *de facto* or "virtual" monopoly arising only from the accident of trade. Moreover, in matters of

[1] Holmes J., *ex banco*, in United States *v.* Standard Oil Co., March 14, 1910.

[2] We may divide monopolies into legal, geographical, and *de facto*, or "virtual" monopolies—phrases which sufficiently describe themselves.

interstate commerce, although it might have been argued that such affairs were left absolutely to the plenary power of Congress, which might well, if it chose, pass laws preventing any railroad from engaging in interstate business, except at a certain rate per mile for passengers or freight—or that no vessel should be allowed to carry passengers or freight from foreign countries except at a certain price per head or per ton—yet the Supreme Court seems to have held that even this plenary power over commerce expressly given to Congress in the Constitution, is limited by the ordinary property guarantees of that instrument; possibly because the Fifth Amendment is of later date than the body of the Constitution.

We thus find that the earliest legislation regulating rates was that of the States. It was thirteen years after the Iowa statute above referred to that the Interstate Commerce Act was passed, which was supposed to give a power—afterward denied by our Supreme Court—to the Interstate Commerce Commission to fix rates. It certainly did give them power to find, upon complaint, what was a reasonable rate, which was *prima facie* evidence in case of appeal. In hundreds of cases actual rates were complained of, in probably many more discrimination was complained of, and, according to Mr. Meyer, the commission was found by the Supreme Court to have decided rightly about half the time. In 1903 came the intelligent Elkins Bill against discrimination, which merely re-enacts the common law, and up to within two or three years has proved the only really effective measure of controlling the rates themselves. In 1906 came the Hepburn Act under Roosevelt, giving general power to the commission to fix rates upon complaint, to make joint rates, extending the statute to the oil pipe-lines, express companies, and sleeping-car companies, and going to the verge of the Constitution in an effort to provide that rates fixed by the commission should take immediate effect. So far as most recent decisions go, however, this great statute has not altered the

position of the Supreme Court of the United States as to the constitutional necessity of a reasonable return to the carrier, and perhaps the cardinal question remains to be decided, whether such rate-making power is legislative, and, if so, may under the Federal Constitution be delegated by Congress to any board. Congress merely proclaims that the rates shall be reasonable and without discrimination—both mere expressions of the common law—and leaves the determination of what is reasonable between the Interstate Commerce Commission and the Supreme Court, neither of them legislative bodies. The common law may, indeed, be decided by a judicial body; but it is difficult to see why the alteration of the common law is not legislation. And this criticism applies *a fortiori* to the Taft Bill just enacted (June, 1910), which gives the Interstate Commerce Commission power to fix rates of their own motion. When, therefore—if the author may venture to repeat his words—the commission fix a "just and reasonable" rate,[1] if they are applying the common law, their act is judicial; if they are fixing other standards, it is legislative.[2]

Coming to the States again, this constitutional difficulty does not concern us, for it has been decided that the division of powers into legislative, executive, and judicial must, as to the States, be expressly provided in the State constitutions and is not guaranteed under the Fourteenth Amendment. Broadly speaking, the history of legislation has been as follows: The States have usually exercised their rate-making power through a railroad or corporation commission. New York and Virginia now employ the more comprehensive phrase "public service" or "corporation" commission. The Massachusetts statute, like the Granger statutes, dates from 1874. Just as we found in the Middle Ages in the case of the Black Death in times of famine, so times of panic with us have always produced radical legislation: this, it will be

[1] United States Act of February 4, 1887, as amended June 29, 1906, sec. 15.
[2] Stimson's "Federal and State Constitutions of the United States," p. 53.

noted, is the year after the great panic of 1873. But the Massachusetts law, the earliest of all, did not and does not authorize any fixing of rates, or even any finding as to what was reasonable upon rates. It extends only to the other conditions of service. The statute is, perhaps, broad enough to permit such a finding as matter of opinion; but it would have no legal effect. The commission, section 15, were authorized to find that a change in rates of fares for transporting freight or passengers was reasonable and expedient, and so inform the corporation and the public, through their annual report. All the Western States, however, did give such power.

As has been said, no constitutional objection has been sustained by the United States Court as to this delegation of power, if it be one; but in later years, possibly dissatisfied with the conservatism of such boards, we find drastic legislation, particularly in the West and South, fixing maximum rates, at least as to passengers (it is obviously difficult, if not impossible, to enact express legislation as to freight rates). Such legislation stands in as strong (or stronger) constitutional position, as rates made by the commission; and only fails when "confiscatory" or when in conflict with Federal legislation. Perhaps the most notable clash between the States and the Federal power has been on this subject in this very last year, where State laws have been annulled and even high State officers enforcing them restrained by injunction of Federal courts. Still, in the legislation of all States, I find as yet none overstepping the limits we have above defined as proper.

The question of the *amount* of return required by the court is, of course, a most important one. It is a difficult subject, because no fixed rule takes any account of risk to the original investment. It is all very well to say that six or eight per cent. is a fair return on invested capital, or even on "cost of reproduction"; but when, as to original promoters, the chance of even any return was as one against ten of a total loss, *fifty* per cent. of annual profit would not be more than

a "fair return"! The original Massachusetts railway legislation seems to contemplate that ten per cent. should be the normal return on railway stock, for it provides that at any time the commonwealth may purchase any or all its railroads upon the payment of the cost, plus ten per cent. a year profit.

Other than in railroads, the main fixing of rates has been in illuminating gas. Many cities are permitted to legislate on this point. In New York it was decided that they might so do, provided the gas company got a fair return on its capital, not including the value of its franchise; and certainly it would seem to be the height of audacity to claim more. Much as if a boy, presented by his father with hens and the feed to support them, were to demand the capitalization of the value of all future eggs upon going out of business! In Boston, intelligent legislation was adopted—based on good mediæval principles—which allows dividends at a sliding scale according to the price of gas to the consumer.[1] The great reason, of course, of the cessation of legislative activity on the part of the States, as to railway rates, has been that the great bulk of rates appertained to interstate commerce, or at least must be controlled by the rates of interstate commerce; so only legislation as to strictly local rates remains.

The two most important questions, aside from that of an actual extortionate rate (which has hardly ever been claimed) are that of discrimination, and of the long-and-short-haul clause, which is really a derivative of the former. We have found the principle against discrimination time-honored in the common law; but modern statutes wisely recognize that discrimination only exists when two persons or two localities are given different rates *under equivalent circumstances*. There has, therefore, been great dispute what these words, "similar circumstances and conditions," in the Federal law may mean. There is no doubt that actual differences in

[1] It will be remembered that the very earliest Statute of Bread and Ale (1266) established such a sliding scale.

cost of service make dissimilar conditions; but does geographical situation, such as is recognized in the long-and-short-haul clause? or still more, the amount of business offering, or the amount of possible competition? Very early the Interstate Commerce Commission and our legislation got to the point of recognizing competition by water; but the competition of other railroads was a thing harder to recognize. Many people think they have a right to a fairly equivalent service at a fairly equivalent cost throughout the United States, and that they have a right to all the advantages of their geographical position. The farmers in Westchester County, about New York, thought they had undoubted reason to complain when the rates on milk were made the same from their farms to the city as from farms in Ohio; pointing out, indeed, that they had bought their farms originally, and paid high prices for the land, for the very reason of its geographical situation close to a great market. Yet in our courts the economic rule has usually prevailed; although no legislation, so far as I have found, recognizes such differences, except under some vague expression such as service or discrimination "under like or similar conditions." Whether legislation will ever come to the point of recognizing the railroad man's shibboleth, "charge what the traffic will bear," is perhaps dubious. And the new Taft Act, in its long-and-short-haul provision, takes a long step in the direction of geographical uniformity and rigidity of rates.

A few examples of modern rate regulation may be given. In 1896 South Carolina fixed a flat passenger rate of three and one-quarter cents per mile. Both South Carolina and Virginia have empowered the railway or public service commission to fix all rates, including telephone and telegraph. Passenger rates are now usually fixed at two cents per mile in the East, or at two and one-half cents in the South or West. In 1907 Kansas and Nebraska arbitrarily reduced all freight rates fifteen per cent. on the price then charged. In 1907 there was some evidence of reaction; Alabama, in

an extra session, repealed her law enacted the same year prescribing maximum freight rates, substituting more moderate rates in seven "groups" (which, however, may be changed by the railway commission!), and also enacted a statute directing the commission and the attorney-general not to enforce the earlier law; while the heavily penal Minnesota law was declared unconstitutional by the United States Supreme Court. In the British empire the power to fix rates is, of course, unquestioned; and they are, as to railways at least, generally regulated by law. Canada in 1903 established a railroad commission, and Nova Scotia in 1908 imposed various restrictions as to tolls, still the English word for rates. So in Ontario and Quebec in 1906, and in Tasmania in 1901. In many States, such as Victoria, the railways are owned by the state, in which case, of course, no question as to the right to fix rates can arise.

IX

TRUSTS AND MONOPOLIES

Legislation against combinations of properties to bring about monopoly, or contracts in restraint of trade, is the last field of legislation we have to consider in connection with property, and possibly in the public mind the most important. Although the law against combinations of laborers rests upon much the same principles, it is perhaps best to give a special chapter to combinations of property, leaving labor combinations to be treated in that special connection. The matter has been written up so voluminously that it might be difficult to say anything new upon the subject, yet for that very reason it may be as well to analyze it into its simplest elements at the common law, and then trace its recent development in our somewhat unintelligent statute-making. At common law, then, these obnoxious acts may be analyzed into five definite heads: forestalling, regrating, and engrossing—which have been thoroughly defined in an earlier chapter and the modern form of which in modern language might be called restraining production or fixing prices, the buying and selling of futures or gambling contracts, and cornering the market—restraint of trade, and monopoly. The broad principles, however, upon which the gravamen of even these first three rests, is restraint of trade, which was always obnoxious at the common law. Contracts in restraint of trade, except such reasonable contracts as partnership, or the sale of a business with condition not to engage in the same trade in a certain limited locality or for a certain limited time, have always been void at the common law. They are not, however,

criminal except by statute, though a combination in restraint of trade, etc., was always so. We found many such statutes as we also found laws which gave a penalty in double or treble damages to the person injured by such combination or contract. The great case of monopolies, reported in full in the seventh volume of the State Trials, is a perfect mine of information on this subject, having been argued many months at great length by the greatest lawyers, three of whom later were chief-justices of England. This is not the case of the playing cards, Darcy's case, commonly called the "Monopoly Case," which is briefly reported in Coke and covers a far narrower subject, the royal grant for a monopoly in the importation (not manufacture or sale) of playing cards, presumably because Coke's reports are far more accessible than the somewhat rare editions of the State Trials; but the great case brought by the British East India Company against one Sandys, the loss of which would have forfeited its charter and its business, and possibly put an end to British dominion in the East. Its charter dated from the early years of Charles II and the 43d Elizabeth. It brought suit against the defendant, who freighted a vessel to East Indian ports. Mention in it is made of a charter to the Muscovy Company as early as Philip and Mary, a much earlier date than is elsewhere assigned to trading corporations. Hundreds of cases of unlawful monopolies are cited, among them the case of the tailors of Norwich, where a combination to work only for certain wages and to advise others not to work for less and to prevent such others from getting employment with their own employer, was held a conspiracy and an attempt to gain a monopoly at the common law. Another case, of one Peachy, who had by royal grant an exclusive right to sell sweet wine in London, was held to disclose an odious monopoly at common law and the king's franchise void.

In the opinion of the writer, had this common law been thoroughly remembered and understood by our bench and bar, to say nothing of our legislatures, very little anti-trust

legislation by the States would have been necessary except, again, of course, to affix modern penalties to such offences. There has, however, been a vast amount of such legislation. In so far as such legislation has embodied the common law, it has stood the test of the courts and been of some value in repressing objectionable trusts or contracts. In so far as it has gone beyond the common law, it has often proved futile and still more often been declared unconstitutional by the courts.

To the five principles of the common law set forth above we have, perhaps, added two new ones. Besides fixing prices, limiting outputs, cornering the market, contracting in restraint of trade, and acting or contracting with the purpose of gaining a monopoly—all of which were objectionable at common law—we have legislated in some States against the securing of discriminatory railway rates for the purpose of establishing a monopoly, and against what we have termed "unfair competition"—that being generally defined to be the making of an artificially low price in a certain locality for the purpose of destroying a competitor, or the making of exclusive contracts; that is to say, refusing to deal with a person unless he binds himself not to deal with anybody else. This last thing can hardly, however, be said to add to common-law principles. Nevertheless, some of the newer State anti-trust statutes prescribe it so definitely that it may be treated as a modern invention.

All this legislation is extremely recent. In the writer's digest of "American Statute Law," published in 1886, I find no mention of trusts in this modern sense, though a special chapter is given to them in volume II, published in 1892. The first legal writing in which the word was used and the rise of the thing itself adverted to is, so far as I know, a contribution to the *Harvard Law Review*, entitled "Trusts," vol. I, page 132; but the trust then had in mind was the simple early form of the railway equipment trust said to have been invented in Pennsylvania, which was indeed copied

in the first agreement, so long kept secret, of the Standard Oil Trust; and also the corporate stock trust, that is to say, the practice then beginning of persuading stockholders to intrust a majority of the capital stock of the corporation into the hands of trustees, receiving in return therefor trust certificates, with a claim to the net earnings of the corporation, but without real voting power; and there are cases in which such trusts were sought to be held invalid and enjoined in equity, sometimes with and sometimes without success.

Before going into the details of anti-trust legislation, it would be well to sketch its history on the broadest possible lines. Legislation began first in the States some years before the Federal Anti-trust Law, or Sherman Act, first enacted in 1890. These earlier statutes, including the Sherman Act itself, made illegal all contracts or combinations between persons or corporations in restraint of trade; and their direct result was to compel the formation of the gigantic modern trust as we now understand it. Had the Sherman Act, instead of being called "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," been entitled "An Act to Compel the Formation of Large Trusts by all Persons Engaged in Similar Lines of Business," it would have been far more correctly described in its title. For whereas, before this act persons or corporations could make contracts or arrangements among themselves which were good and valid working agreements unless so clearly monopolistic as to be held unreasonable restraint of trade at the common law (which, indeed, so far as I know, was never done in any American court), after the Sherman Act was passed all such contracts, combinations, or arrangements, even when reasonable and proper, were made illegal and criminal. The only escape, therefore, was to bring all such persons and corporations in the same trade together in one corporation, and this is precisely what we now term a trust. Before 1890, in other words, a trust was really an agreement,

a combination of individuals or corporations usually resting upon an actual deed of trust under which the constituent parties surrendered their property or the control of their property to a central board of trustees; since 1890 this kind of trust has practically disappeared and been replaced by the single large corporation, either a holding company which holds the stock of all constituent companies, or under still more modern practice, because more likely to stand the scrutiny of the courts, a huge corporation, with a charter given by the liberal laws of New Jersey, West Virginia, or other State, which actually holds, directly, all the properties and business of the constituent corporations or persons. The modern question, therefore, has become really the question of the large corporation, its regulation and its control; further complicated, of course, by the fact that hitherto there has been no power to control such large corporations except the very State which creates them, which is usually quite indifferent to their acts so long as they pay the corporation tax. It is therefore a question not only of the large corporation, but of the powers of the States over each other's corporations and of the Federal government over all. Until the Northern Securities case, it was probably supposed that a corporation, being an individual, could not be guilty of a criminal conspiracy, and consequently could not in itself offend against the anti-trust acts. That case, and more recent decisions still, show a disposition of the courts to look behind the screen of the fictitious entity of the corporation to the merits and demerits of the persons making it up, and the objects with which they came together and the methods they continued to use.

The Federal statute was indeed necessary to this extent, that, although the common law was unquestioned, as there is no Federal common law in the absence of statute, and as interstate commerce cannot be controlled by State law, either common or statute, it was necessary for Congress to declare that the principles of the common law should apply to inter-

state commerce. It was also doubtless wise to remind the public of the existence of this body of law and to affix definite prohibitions and penalties. To this extent the anti-trust legislation, both State and Federal, is fully justified. Nevertheless, it is noteworthy that the older States, where both the legislatures and the bar had presumably a higher degree of legal education, rarely found it necessary to enact statutes against trusts. There has never been, for instance, any anti-trust law in Massachusetts or in Pennsylvania, or for a long time in New York, for the first statute of that State against trusts was made intentionally futile by being applied only to a trust which secured a complete—*i. e.*, one hundred per cent.—monopoly of its trade.

The economic consideration of all such legislation we do not propose to consider; whether it was wise to forbid all forestalling, for instance—which at the common law meant buying at a definite distance as well as at a distant time; that is to say, a person who bought all the leather in Cordova was guilty of forestalling as well as the person who bought all the sherry that was to be made in Spain in the ensuing year—what we call the buying of futures. This is certainly very unpopular, and we find most of our States legislating against it; yet, of course, many economists argue that it is only by allowing such contracts that the price of any article can be made stable and a supply stored in years of plenty against years of famine. The first historical example of forestalling and engrossing is to be found in the book of Genesis. Joseph was not, I believe, a regrator, but he was one of the most successful forestallers and engrossers that ever existed, and made a most successful corner in corn in Egypt; and his case is cited as a precedent in the Great Case of Monopolies above mentioned. James C. Carter tells us[1] that all these laws are contrary to modern principles and were repealed a century ago. I cannot find that such is the case. On the contrary, they were made perpetual in the thirteenth

[1] "Law, Its Origin, History, and Function," N. Y., 1907.

year of Elizabeth, and we find perfectly *modern* trust legislation as early as Edward I, in 1285. In 1892 I find legislation already in nineteen States and Territories; North Dakota, indeed, having already a constitutional provision. Three States at least, Kansas, Michigan, and Nebraska, seem to have been before the Federal Act, their laws dating from 1889; while several States have statutes in 1890, the year in which the Sherman Act was enacted. There has hardly a year passed since without a good many statutes aimed against trusts, though they have shown a tendency to decrease of late years, and it is especially noticeable that anti-trust legislation is apt to cease entirely in the years following a panic, as if legislatures had learned the lesson that too much interference is destructive of business prosperity; I find that by 1908 just about half the States had embodied a prohibition of trusts in their organic law.[1]

One of the principal earlier objects of the trust was to evade the corporation law. To-day they specially aim at becoming a legal corporation. In like manner their earliest object and desire was to escape all Federal supervision and interference by legislation or otherwise; to-day they are desirous of such regulation under Federal charters, for the purpose of escaping the more multifarious and radical law-making of the forty-six different States. Before the Industrial Commission in 1897–1900, all the heads of the great "trusts"—Rockefeller, Archbold, Havemeyer—testified in favor of Federal incorporation; almost all other witnesses, except one or two New York or New Jersey corporation lawyers, against it.

In the article in the *Harvard Law Review*, above referred to, the writer suggested that the evil might be cured by compelling trusts to organize as corporations, thereby bringing them under the regulation and control that the State exercises over corporations. That has come to pass, but the

[1] These provisions will be found digested in the writer's "Federal and State Constitutions," pp. 339–341.

remedy has not seemed adequate. In the early Sugar Trust case, the New York Supreme Court decided that combinations to sell through a common agent, thereby, of course, fixing the price, with other common devices for controlling the market and preventing competition, were illegal at the common law; and also that a corporation which, in order to bring about such a combination, put all its stock in the hands of trustees or a holding company, thereby forfeited its charter, the only result of which decision was to drive the Sugar Trust from its New York charters to a legal organization in the State of New Jersey. It is noteworthy that one or two of the most obvious remedies for this condition of things have never been employed, possibly because they would be too effective. That is to say, there might be legislation that a corporation should not act out of the State chartering it —that a New Jersey corporation, holding no property and doing no business in New Jersey, should not be used to carry on business in New York. We also might have legislated, going back to the strict principles of the common law, to forbid any corporation, any artificial body, from holding shares in another corporation. It is doubtful, to-day, whether this can be done under the common law, and the authors of the Massachusetts corporation law refused expressly to provide for it; on the other hand the proposed Federal Incorporation Act expressly validates it. We do, however, begin to see some legislation on this line of approach, notably in the case of competing companies, several Western States at least having statutes forbidding a corporation from holding stock in such companies; and it was one of the recommendations of President Taft's recent message, at least as to railroad companies not holding half of such stock.

It will well repay us now to make a careful study of all these anti-trust statutes, for the purpose of seeing whether they have introduced any new principles into the law, and also in what manner they express the old. Up to two or three

years ago one might have said that not a single case had been decided in the courts of any State or of the Federal government against trusts or combinations, which might not have been decided the same way under common-law principles had there been no anti-trust legislation whatever. As is well known, the great exception to this statement is the interpretation of the Federal Act by the Supreme Court of the United States, declaring that any contract in restraint of trade was unlawful under it, although it would have been reasonable and proper at the common law. Later indications are, as President Taft has said, that the courts will see a way to modify this somewhat extravagant position by reintroducing the common-law test, viz.: Whether the contract is done with the *purport* (or effect) of making a monopoly for destroying competition, or whether such result is trivial and incidental to a reasonable and lawful business arrangement. The earliest statutes, those of Michigan, Kansas, and Nebraska, in 1889, denounce the following principles: "All contracts, agreements, understandings, and combinations . . . the *purpose* or object of which shall be to limit or control the output, to enhance or regulate the price, to prevent or restrict free competition in production or sale." This, the Michigan statute, merely states the common law, but goes on to declare such contract, etc., a criminal conspiracy, and any act done as part thereof, a misdemeanor, and, in the case of a corporation, subjects it to forfeiture of its charter. The law makes the exception, nearly universal in the Southern and Western States, that this anti-trust legislation shall not apply to agricultural products, live stock in the hands of the producer, nor to the services of laborers or artisans who are formed into societies or trades-unions—an exception which, of course, makes it class legislation, and has caused the whole law to be declared unconstitutional, so far as I know, by the highest court of every State where it has been drawn in question, and under the Fourteenth Amendment also by the Supreme Court of the United States;

and in this spirit President Taft has just acted in preventing a joint resolution of Congress appropriating money to prosecute trusts from exempting labor unions. The Kansas statute is substantially like the Michigan, but more vague in wording (Kansas, 1889, 257). It denounces arrangements, contracts, agreements, etc., which (also) *tend* to advance, reduce, or control the price or the cost to the producer or consumer of any productions or articles, or the rate of insurance or interest on money or any other service. The Maine law (Maine, 1889, 266, 1) is aimed only against the old-fashioned trust; that is to say, the entering of firms or incorporated companies into an agreement or combination, or the assignment of powers or stock to a central board, and such trust certificates or other evidences of interest are declared void. The Alabama statute of 1891 is to similar effect.

The Tennessee statute of 1891 is about the same as the Kansas statute of 1889, above referred to, except that it adds the words "which tend in any way to create a monopoly," and the Kansas statute makes trust certificates unlawful, that being still the usual way of organizing a trust at that time. The Nebraska law (Nebraska, 1889, 69) is much the same, except that it also denounces combinations, etc., whereby a common price shall be fixed and whereby any one or more of the combining parties shall cease the sale or manufacture of such products, or where the products or profits of such manufacture or sale shall be made a common fund to be divided among parties to the combination, and goes on to add that "pooling between persons, partnerships, corporations . . . engaged in the same or like business for any purpose whatever, and the formation of combinations or common understanding" between them is declared unlawful, and the persons are made liable for the full damage suffered by persons injured thereby, and each day of the continuance of any such pool or trust shall constitute a separate offence; this, the doctrine of a continuing conspiracy, being for the

first time before the Supreme Court of the United States at the time of writing. North Carolina the same year (N. C., 1889, 374) defines a trust to be an arrangement, understanding, etc., for the purpose of increasing or reducing the price beyond what would be fixed by natural demand, and makes it a felony with punishment up to ten years' imprisonment. Here for the first time appears a statute against unfair competition. "Any merchant, manufacturer . . . who shall sell any . . . goods . . . for less than actual cost for the purpose of breaking down competitors shall be guilty of a misdemeanor." Tennessee the same year (Tennessee, 1899, 250) in its elaborate statute, which is a fairly good definition of the law, also denounces throwing goods on the market for the purpose of creating an undue depression, whatever that may mean. In the next year, 1890, there were many more State statutes, but we should first notice a simple law of New York forbidding any stock corporation from combining with any other corporation for the prevention of competition (N. Y., 1890, 564, 7). The usual statute in other States of that year is addressed against combinations to regulate or fix prices or limit the output, but Texas (4847a, 1) and Mississippi (1890, 36, 1) have elaborate laws, which, however, add hardly any new principles to the common law. They define a trust to be a combination of capital, skill, or acts, by two or more persons or corporations, (1) to create or carry out restrictions in trade; (2) to limit or reduce the output, or increase or reduce the price; (3) to prevent competition; (4) to fix at any standard or figure whereby its price to the public shall be in any manner controlled, any article intended for sale, etc.; (5) to make or carry out any contract or agreement by which they are bound not to sell or trade, etc., below a common standard figure, or to keep the price at a fixed or graduated figure, or to preclude free or unrestricted competition among themselves or others, or to pool or unite any interest. To much the same effect is the statute of South Dakota (1890, 154, 1), but it also denounces any combina-

tion which tends to advance the price to the consumer of any article beyond the reasonable cost of production or manufacture. The Louisiana (1890, 36) and New Mexico laws (1891, 10) are aimed particularly at attempts to monopolize, while the Oklahoma statute (6620) was aimed only at corporations, and the broad wording of the Federal act passed this year should be noted: "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal" (U. S., 1890, 647, 1); and in the second section: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty under this act." And in the third section: "Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor." The rest of the legislation provides penalties, manner, and machinery for the enforcement of these laws by prosecuting attorneys, etc., with a usual allowance to informants; and it may be here noted that one great trouble has resulted from this machinery, for it provided injunction remedies and dissolution, which may well be too severe a penalty, and, furthermore, dispenses with a jury and throws unnecessarily upon the court—even now, as in the Standard Oil case, a distant high court of appeal—the burden of determining a complicated and voluminous mass of fact. Our ancestors never would have suffered such matters to be adjudged by the Chancellor!

South Dakota has an extraordinary statute making the agents for agricultural implements, etc., guilty of a criminal offence when their principals refuse to sell at wholesale prices to dealers in the State (S. D., 1890, 154, 2). But beside these remedies, there is a frequent statute dating from the earliest Kansas act of 1889, that debts for goods sold by a so-called trust, contracts made in violation of the law, will not be en-

forced in favor of the offending person or corporation. That is to say, the person buying the goods of a trust may simply refuse to pay for them; and the constitutionality of this legislation has recently been sustained by a divided opinion in the Supreme Court of the United States.[1] The possession or ownership of trust certificates is in some States made criminal. Corporations offending against the statute are to have their charters taken away, or, if chartered in other States, to be expelled from the State. All contracts or agreements in violation of any of these statutes are, of course, made void.

There are special statutes in Kansas, Nebraska, and North Dakota against trusts in certain lines of business, as, for instance, the buying or selling of live-stock or grain of any kind.

In the twenty years that have elapsed since this early legislation there has been considerable clarifying in the legislative mind; modern statutes, and especially constitutional provisions, stating the offence much more concisely, with a simple reliance upon the common law, leaving it, in other words, for the courts to define. The Southern State constitutions generally enact that the legislatures shall enact laws to prevent trusts. New Hampshire says: "Full and fair competition in the trades and industries is an inherent and essential right of the people, and should be protected against all monopolies and conspiracies which tend to hinder or destroy." Oklahoma provides that "the legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination." In Wyoming, monopolies and perpetuities, in South Dakota and Washington, monopolies and trusts, are "contrary to the genius of a free State and should not be allowed." The constitutional provisions of North Dakota, Minnesota, and Utah are again a

[1] Continental Wall Paper Co. *v.* Voight, 212 U. S. 227.

mere repetition of the common law. The New Hampshire statute grants "all just power . . . to the general court to enact laws to prevent operations within the State of . . . trusts . . . ," or the operations of persons and corporations who "endeavor to raise the price of any article of commerce or to destroy free and fair competition . . . through conspiracy, monopoly or any other unfair means to control and regulate the acts of all such persons." This last clause, though a clear statement of the common law, would, of course, render hopeless Mr. Gompers's crusade in favor of the boycott, the object of a boycott invariably being to control the acts of somebody else. Alabama directs the legislature to provide for the prohibition of trusts, etc., so as to prevent them from making scarce articles of necessity, trade, or commerce, increasing unreasonably the cost thereof, or preventing reasonable competition; and to much the same effect in Louisiana.

We may well close this brief survey by a study of the volume of such legislation. We have, for instance, in 1890, seven anti-trust laws; in 1891, six; in 1892, one; in 1893, eight. In 1894, doubtless as a consequence of the panic, anti-trust legislation absolutely ceased, and in 1895 there is only one law, passed by the State of Texas, its old law having been declared unconstitutional. In 1896, under the influence of President Cleveland's administration, we find four such statutes, and in 1897, with reviving prosperity, thirteen. Still, we find no new principle, except, indeed, the somewhat startling statement in Kansas that it is unlawful to handle goods made or controlled by monopolies. The Illinois statute of that year permitted combinations as to articles whose chief cost is wages when the object or effect is to maintain or increase wages, a qualification which led to the whole law's being declared unconstitutional. In Tennessee there is a special statute penalizing combinations to raise the price of coal, a statute with good old precedents in early English legislation. By this time most of the States had adopted

anti-trust statutes. In 1898 we find only one law, that of Ohio, giving the same five-fold definition of the trust that we found above in Alabama, but it adds the somewhat startling statement that "the character of the combination may be established by proof of its general reputation as such," and again it is made criminal to own trust certificates, with double damages in all cases to persons injured. A constitutional lawyer might well doubt whether a conviction under the last half of this statute would be sustained. In 1899 eleven of the remaining States adopted anti-trust laws. In 1900 there is a new statute in Mississippi prohibiting, among other things, the pooling of bids for public work, this again being a mere statement of the common law, although a law which has possibly grown uncommon by being generally forgotten.

In 1901 there are four statutes, that of Minnesota also including a prohibition of boycotts, and the first piece of legislation upon the subject in the old Commonwealth of Massachusetts—an ordinary statute against exclusive dealing; that is to say, the making it a condition of the sale of goods that the purchaser shall not sell or deal in the goods of any other person. In 1902 both the Georgia and Texas laws were declared unconstitutional because they exempted agricultural pursuits. South Carolina has a statute actually prohibiting any sale at less than the cost of manufacture, doubtless also unconstitutional. In Ohio corporations are forbidden to own stock in competing companies. The Illinois anti-trust act was declared unconstitutional in 1903, while Texas amended its statute to meet the constitutional objection, and followed South Carolina in prohibiting the sale of goods at less than cost.

In 1904 there is no anti-trust legislation. In 1905 the South Carolina law is held unconstitutional, and in 1906, that of Montana. In 1907, however, under the Roosevelt administration, there was a decided revival of interest, seventeen States adopting new statutes or amendments, but still

I can find no new principles. Kansas copies the Massachusetts statute, and Massachusetts extends it to the sale or lease of machinery or tools. Minnesota and North Carolina have interesting statutes prohibiting discrimination between localities in the sale of any commodity. Most of the States by this time have statutes compelling persons to give testimony in litigation about trusts and exempting them from prosecution therefor. North Dakota has also a statute prohibiting unfair competition and discrimination as against localities, while Tennessee makes it a misdemeanor to sell any article below cost or to give it away for the purpose of destroying competition. In 1908 Louisiana and Mississippi adopted the principle forbidding discrimination against localities, and the new State of Oklahoma comes into line with the usual drastic anti-trust statute, and we may, perhaps, conclude this review of a somewhat unintelligent legislative history by perhaps the most amusing example of all. The Commonwealth of Massachusetts, which had so far refrained from unnecessary legislation on this great question, thought it necessary to adopt a statute making void contracts to create monopolies in restraint of trade, which well shows the necessity of a legislative reference bureau or professional draftsman, as discussed in a later chapter. That is to say, it says literally: "Every contract, etc., in violation of the common law . . . is hereby declared to be against public policy, illegal, and void." As the law of Massachusetts is the common law, and always has been the common law, this amounts to saying that a contract which has always been void in Massachusetts is now declared to be void. But, moreover, on a familiar principle of hermeneutics, it might be argued to repeal the whole *criminal* common law of restraint of trade—doubtless the last thing they intended to do!

As this is a book upon actual legislation, it would be out of place to attempt a serious discussion of the problem that lies before us. Suffice it to say that there are three possible methods of approaching the question, as it is complicated

with the interstate commerce power of the Federal government. That is to say, either to surrender this power to the States, at least so far as it may be necessary to enable them to regulate or prohibit the actions of combinations in the States, even when engaged in interstate commerce; or, second, by perfecting the present dual system and establishing Federal supervision over State corporations engaged in interstate commerce by way of license and control; or, third, the most radical remedy of all, apparently adopted by the present administration, of surrendering entirely the State power over corporations to the Federal government, at least as to such corporations as might choose to take advantage of such legislation. This would result in a centralization of nearly all business under the control of the Federal government, as well as the removal of the great bulk of litigation from State to Federal courts. If not carefully guarded it would deprive the States not only of their power to tax corporations, but of their ordinary police powers over their administration. Such a radical step was unanimously opposed by the United States Industrial Commission in 1900, and by nearly all their expert witnesses, and was then, at least, only favored by the heads of the great trusts, Mr. Archbold, Mr. Rockefeller, and Mr. Havemeyer.[1] But whichever way we look at it, there is no question that the problem of the modern trust is that of the corporation, both as to what laws shall regulate such a corporation, and whether they shall be acts of Congress, or State statutes, or both.

[1] For the full arguments on this most important question, the reader may be referred to the article by Horace L. Wilgus in the *Michigan Law Review*, February and April, 1904, and to the writer's debate with Judge Grosscup, printed in the *Inter-Nation Magazine* for March, 1907.

X

CORPORATIONS

The earliest trading or business corporation in the modern sense now extant seems to have been chartered in England about the year 1600, though Holt in the monopoly case dates the Muscovy Company from 1401, and, despite the Roman civic corporations, has really no actual precedent in economic history; that is to say, as a phenomenon under which the greater part of business affairs was in fact conducted. Whether derived historically from the guild or the monastic corporation of the Middle Ages is a question merely of academic importance, for the business corporation rapidly became a very different thing from either; and, indeed, its most important characteristic, that of relieving the members of responsibility for the debts of the corporation, is an invention of very modern times indeed, the first statute of that sort having been invented in the State of Connecticut, enacted in May, 1818. These early English corporations, such as the Turkey Company, the Fellowship of Merchant Adventurers, chartered in 1643, or the Hudson Bay Company, usually gave a monopoly of trade with the respective countries indicated, such monopolies in foreign countries not being considered obnoxious.[1] The wording of such early charters follows substantially the language of a town or guild charter, and was doubtless suggested by them. Unfortunately, it has never been the custom to print corporation charters in the Statutes of the Realm, and it is practically impossible to get a sight of

[1] The charter of the East India Company was attacked on this ground and successfully defended by Holt on the ground that the common law did not mind monopolies in trade with heathens!

the original documents if, indeed, in many cases, they now exist. So far as I have been able to study them, they always give the right to transfer shares freely, with the other great right, perpetual succession; but no notion appears, for at least two centuries, that the shareholders are relieved from any of the legal obligations of the corporation.

In order to understand this whole problem it is necessary to bear in mind certain cardinal principles of our constitutional law. All corporations, with the exception of national banks, two or three railroad companies, and the Panama Canal, have been and are creatures of the State, not, as yet, of the Federal government, which can only create them for purposes specifically delegated to it and not merely for private profit. The power to create corporations is essential to sovereignty, and the sovereign may decline to recognize all but its own corporations. Under the doctrine of comity, such corporations can act in any other State with all the powers given them in the State where they are created, except only they be expressly limited by a statute of such other State. They may, however, be entirely excluded; only not to the destruction of property rights once acquired. On the other hand, corporations conducting interstate commerce may not be excluded or such business interfered with by State legislation.

The writer was for four years counsel to the Industrial Commission at Washington and one of the commissioners appointed to draw the present business corporation law of Massachusetts. In both such capacities he had the advantage of hearing the expert opinions of many witnesses. There were two, and only two, broad theories of legislation about private business corporations: One view, the older view, that they should be carefully limited and regulated by the State at every point, and that their solvency, or at least the intrinsic value of their capital stock, should, as far as possible, be guaranteed by legislation, to the public as well as to their creditors and stockholders; and that for any fraud, or even

defect of organization, the stockholders, or at least the directors, should be liable. On the other hand, the modern view, that it was no business of the public to protect investors, or even creditors, and that the corporations should be given as free a hand as possible, with no limitation as to their size, the nature of business they are to transact, or the payment in of their capital stock. This is the corporation problem. The State-and-Federal problem may be called that other difficulty which arises from the clashing jurisdictions of the States among themselves and with the Federal government, their laws and their courts, as to the corporations now created, particularly railroads and corporations "engaged in interstate commerce" which may include all the "trusts," if the mere fact that they do business in many States makes them so.

Suppose you had a world where one man in every ten was gifted with immortality and with the right not to be answerable for anything that he did. You can easily see that the structure of society, at least as to property, labor, and business affairs, would be very decidedly altered. Yet this is what really happened with the invention of the modern corporation; only we have got completely used to it. It would be possible to have got on without any business corporations at all. Striking as this may seem at first thought, one must remember that the world got on very well without corporations for thousands of years, and that it was by a mere historical accident and a modern invention that the two great attributes of the corporation, immortality and personal irresponsibility, were brought about. All business might still be conducted, as it was in the Middle Ages, by individual men or by partnerships, and still we should have had very great single fortunes like that of Jacques Cœur in France, an early prototype of Mr. J. Pierpont Morgan, or even vast hereditary fortunes kept in one family, like the Fuggers of Augsburg, and based on a natural monopoly—mineral salt—as is Mr. Rockefeller's upon mineral oil. Yet as lives are

short and abilities not usually hereditary, the great corporation question of to-day would hardly have arisen. Nevertheless, it is presumed that no one, not even the greatest radical, would now propose to dispense with the invention of the business corporation with limited liability.

A careful discussion of the two theories above referred to will be found in pages 1 to 28 of the report of the Committee on Corporation Laws to the legislature of Massachusetts, of January, 1903. The bill for a business corporation law recommended by this committee was enacted into law without substantial change, and has apparently been satisfactory in the six years it has been in force, as the amendments to it, except only as to the system of taxation of corporations, have been few and trifling. I venture to quote from the report referred to a few of the remarks of the commissioners upon the general question, as it is now out of print:

> The investigations of the committee, the results of which have been briefly summarized, have led to the following conclusions:
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> *First.*—That the more important provisions of the present law regulating the organization and conduct of business corporations and the liability of its stockholders and officers are unsuited to modern business conditions.
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> *Second.*—That the restrictions governing capitalization and the payment of stock as shown in the piecemeal legislation enlarging the classes of corporations which may organize under general laws are arbitrary or impossible of execution.
>
> *Third.*—That it is a general practice to organize under the laws of other States corporations to carry on enterprises which are owned and managed by citizens of Massachusetts, particularly where a part or all the property is situated outside the State.
>
> THEORY OF LEGISLATION RECOMMENDED
>
> The history of corporations, as well as the logic of the case, shows that there are possible two general theories as to the State's duty in creating corporations: first, the old theory that, being creatures of the State, they should be guaranteed by it to the public in all particulars of responsibility and management; and the modern quite opposite theory that, in the absence of fraud in its organization or

government, an ordinary business corporation should be allowed to do anything that an individual may do. Under the old theory the capital stock of a corporation was, in the law, considered to be a guarantee fund for the payment of creditors, as well as affording a method of conveniently measuring the interests of the individual owners of a corporate enterprise. There resulted from this principle not only the fundamental proposition that the capital stock, being in the nature of a guarantee fund, should be paid up at its full par in actual cash, but all the other provisions to protect creditors or other persons having dealings with the corporation; such as, that the debts of a corporation should not exceed its capital stock—designed primarily in the interest of creditors and secondarily in that of the stockholders, who were looked after as carefully as if they were the wards of the State when dealing in corporation matters. Under the modern theory, the State owes no duty, to persons who may choose to deal with corporations, to look after the solvency of such artificial bodies; nor to stockholders, to protect them from the consequences of going into such concerns, the idea being that, in the case of ordinary business corporations, the State's duty ends in providing clearly that creditors and stockholders shall at all times be precisely informed of all the facts attending both the organization and the management of such corporations, and particularly that there should be full publicity given to all details of the original organization thereof.

The committee has had little hesitation in determining which of these theories it should adopt. The limit of capitalization both in amount and in valuation to the net tangible assets of the corporation has unquestionably had much to do with the arrest of corporate growth in this commonwealth. Good-will, trade-marks, patents may unquestionably be valuable assets, which, under our present method, may not be capitalized. Admirable as this theory may have been, of payment of capital stock in full in cash, the condition is so easily avoided in practice that the result is that our existing law promises a protection which, in reality, it does not afford, and is merely an embarrassment to those who feel obliged to comply not only with the letter but with the spirit of the law. It is no longer true that persons dealing with corporations rely upon the State laws to guarantee their solvency or their proper management. The attempts of the commonwealth to do so by laws still remaining on its statute books result, as we apprehend, only in a false sense of security; and we believe that the act proposed, while giving up the attempt to do the impossible thing, will really, by its greater attention to the details of organization required to be made public by all

corporations, result in an advantage to stockholders and creditors more substantial than the present partial attempt to enforce a principle impossible of complete realization and which is, under existing laws, easily evaded.

It is impossible to reconcile or combine the two systems. Either the old theory must be maintained, under which the State attempts though vainly to guarantee both to stockholders and creditors that there is one hundred dollars of actual value behind each one hundred dollars of par value of capital stock, or some other system must be adopted which, while not being chargeable with the vagueness and laxity of the newer legislation of other States, will permit a share of capital stock, although nominally one hundred dollars in value, to represent, as the word implies, only a certain share or proportion, which may be more or less than par, of whatever net assets the corporation may prove to have. Under a system of this sort the State machinery will only provide that the stockholders and, perhaps, the creditors, may at all times have access to the corporation records or returns in such manner as clearly to show, both at organization and thereafter, all of the property or assets of which such share of capital stock actually represents its proportion of ownership.

The question of monopoly the committee does not conceive to have been left to its consideration. The limitations now existing on the capitalization of business corporations are, no doubt, attributable to the sentiment which has always existed against monopoly, but it is clearly the policy of the commonwealth, as shown in its recent legislation, to do away with the attempt to prevent large corporations, simply because they are large. Moreover, it is apprehended that the question of monopoly, or rather of the abuse of the power of large corporations, does not result necessarily from the size of corporations engaged in business throughout the United States. In the opinion of the committee, some confusion has been created, in the discussion of the form of so-called trust legislation, by a failure to appreciate that its real object is not to protect the investor, who can or should learn to take care of himself, or the creditor who has already learned to do so. The real purpose of such legislation is the protection of the consumer. In other words, there is no reason for an arbitrary limitation of capitalization unless it can be used as a means of creating a monopoly which will influence the price of commodities. In the opinion of the committee, the question of capitalization is not a contributing factor in the fight for a monopoly. The United States Steel Company would have no greater and no less a monopoly of the steel business if it were organized with one-half of its present capitalization. The Standard

Oil Company has a very conservative capitalization, and yet it is the most complete monopoly of any industrial corporation in this country.

It has not been the intention of the committee to draft a law which will be favorable to the organization of large corporations popularly known as "trusts." Inasmuch as the recommended law requires taxes to be paid upon the full value of the corporate franchise, which is, at least to some extent, measured by the amount of capitalization, there will always be this very potent reason for keeping capitalization at the lowest possible point. Indeed, it is apprehended that the organization of a corporation large enough to control a monopoly of any staple article is practically prohibited by the provisions of the recommended law as to taxation, which will be referred to in greater detail in part II of this report. At all events, it is no better for the State to leave its citizens at the mercy of the large corporations created by other less careful sovereignties, than to permit the organization of corporations adequate to the demands of modern business under its own laws, subject to its own more careful regulation and control. Under our State and Federal system it is practically impossible for any one State, by its own laws, to control foreign corporations, but so far as possible at present the committee has sought to subject them to the same safeguards of reasonable publicity and accurate returns, both as to organization and annual condition, as the State requires of its own corporations. The simple requirement of an annual excise tax, based on the capitalization of such foreign corporations, will serve to bring them under the control of this State and the way will be open for their further regulation if desirable. This annual tax has been levied upon the same principle as the corresponding tax paid by home corporations. The State should impose no greater burden on foreign corporations than on its own, but should, so far as possible, subject them to its own laws.

The recommendations of the committee have, therefore, been controlled by three principles, which may be summarized as follows:

First.—The relation of the State to the corporation.

The committee would repeat its opinion that, so far as purely business corporations are concerned, and excluding insurance, financial and public service corporations, the State cannot assume to act, directly or indirectly, as guarantor or sponsor for any organization under corporate form. It can and should require for itself and for the use of all persons interested in the corporation, the fullest and most detailed information, consistent with practical business methods, as to the details of its organization, the powers

and restrictions imposed upon its stockholders and as to the property against which stock is to be or has been issued. Provision is, therefore, made in the law drafted by the committee for the organization of such corporations for any lawful purpose other than for such purposes as the manufacture and distilling of intoxicating liquors or the buying and selling of real estate which it has been the consistent policy of the commonwealth to except from incorporation under the general law. Any desired capitalization above a minimum of one thousand dollars may be fixed. Capital stock may be paid for in cash or by property. If it is paid for in cash, it may be paid for in full or by instalments, and a machinery has been created for protecting the corporation against the failure of the subscribers to stock to pay the balance of their subscriptions. If stock is paid for by property, the incorporators and not the State are to pass upon its value. Before any stock, however, can be issued for property, a description of the property sufficient for purposes of identification, to the satisfaction of the Commissioner of Corporations, must be filed in the office of the Secretary of the Commonwealth. This document becomes a public record and may be consulted by any one interested in the corporation. If the officers of a corporation make a return which is false and which is known to be false, they are liable to any one injured for actual damages. If a full and honest description is made of property against which stock is issued, a stockholder cannot complain because of his failure to inform himself by personal examination or investigation of the value of the property in which he is, or contemplates becoming, an investor.

Second.—Duties of the State in regulating the relations between the corporation and its officers and stockholders.

The second principle upon which the committee has acted in its specific recommendations is this: that the State should permit the utmost freedom of self-regulation if it provides quick and effective machinery for the punishment of fraud, and gives to each stockholder the right to obtain the fullest information in regard to his own rights and privileges before and after he becomes the owner of stock.

Upon this theory the committee has recommended a law which permits the corporation to determine the classes of its stock and the rights and liabilities of its stockholders. The recommended law provides for increasing or decreasing the amount of capital stock upon the affirmative vote of a majority of its stockholders. For the protection of a minority interest of stockholders it requires a two-thirds vote to change the classes of capital stock or their

voting power, to change the corporate name or the nature of the business of the corporation, or to authorize a sale, lease, or exchange of its property or assets.

Directors are made liable, jointly and severally, for actual damages caused by their fraudulent acts, but no director is made so liable unless he concurs in the act and has knowledge of the fraud. The liability of stockholders is limited to the payment of stock for which they have subscribed, to debts to employees, and in cases of a reduction of capital when they concur in the vote authorizing a distribution of assets which results in the insolvency of the corporation. An attempt has been made to give to the stockholder an opportunity of securing for himself the fullest information on all points touching his interest.

Third.—The relation of the State to foreign corporations.

The committee has been guided upon this subject by the theory that the treatment of foreign corporations by the Commonwealth should, so far as practicable, be the same as of its own, particularly so far as concerns the liabilities of officers and stockholders, the statements filed with the State authorities for the information of stockholders or others as to their capitalization and the methods adopted of paying in their stock, and the annual reports of condition required for taxation purposes or otherwise. On the same principle a nominal franchise tax is annually imposed corresponding to the tax imposed by the State on its own corporations and made approximately proportional in amount.

A few broad general principles are almost universal in American legislation on the subject. Ordinary business corporations are now almost universally created under general law, and indeed by the constitutions of many States are forbidden to be created by special charter.[1] There is generally, however, no limitation by constitution on the size or capitalization, though the duration of corporations is frequently limited to twenty, thirty, or fifty years; and there is generally no limitation on the nature of the business that may be done, except, in a large number of States, banking and insurance, and except that there is in many States, as, notably, Massachusetts, a prejudice against land companies, so that they may not be created without a special charter.

[1] See Stimson's "Federal and State Constitutions," pp. 295, 315, 316.

The liability of stockholders is commonly limited to the shares of stock actually held or such portion of them as may not have been paid up by the stockholder in cash or property value. Massachusetts and the more conservative States attempt to provide that the stock shall be actually paid up in money or in property of the real value of money, at par. New Jersey, New York, Maine, West Virginia, and the laxer States, practically allow their directors to issue stock for anything they choose—labor, contracts, property, or a patent right—and their judgment on the value of such property is held to be final in the absence of fraud. Corporations are usually taxed, like individuals, on their tangible, visible property, real and personal, and in many States there is also a franchise tax on their shares.[1] There is a frequent limitation that the corporate indebtedness shall not exceed the amount of the capital stock.[2] No States, except Vermont and New Hampshire, seem now to have any limitation on the amount of the capital stock, or if there be a limitation, as of one million dollars at the time of formation, the corporation may subsequently increase its stock to any amount.[3] Michigan, however, had a limitation of five million dollars as to manufacturing or mercantile corporations, and two million five hundred thousand dollars as to mines; while Alabama and Missouri had a general limit of ten million dollars. The general tendency is clearly to have no limitation whatever. Commonly only a nominal proportion of the capital stock is to be paid in before the company begins business, but the stockholders are always liable to creditors for the amount unpaid. As already remarked, stock may usually be paid up in property, labor, or services, or, indeed, any legal consideration; and though most States provide that such property, etc., shall be taken at its actual cash value, such laws, except in Massachusetts, are not believed to be effectual.

[1] A valuable report on this subject, brought down to 1903, prepared by F. J. MacLeod, of Massachusetts, will be found in the "Report of the Committee on Corporation Laws," above referred to, at pp. 207–295.

[2] MacLeod, pp. 165–166.

[3] MacLeod, p. 169.

That stockholders are individually liable to the extent of the unpaid balance on their stock is merely a statutory statement of the ordinary rule in equity. It is, therefore, law without statute. Apparently only Indiana and Kansas now impose a double liability, the law in Ohio having been recently altered by constitutional amendment. In several States, however, they are liable for debts due for labor; in California they are absolutely liable for such proportion of all liabilities of the corporation as their stock bears to the total capital stock, while in Nevada they are expressly exempted from any liability whatever.

We can trace two other decided tendencies in recent legislation about corporations. First, the increasing effort to bring about publicity of all such matters as well as of the annual books and accounts, well exemplified in the Massachusetts statute; second, the usual strong prohibitions against consolidations to permit trusts or contracts to further monopoly. There has also been a still more recent line of legislation to prevent corporations from holding stock in other corporations, or, at least, in competing companies; and to prevent alien corporations from holding land.[1] Under the strict common law no corporation could own or hold stock in another corporation or in itself. This has been completely departed from in practice in this country, and though not affirmatively recognized in most statutes—the Massachusetts statute, for instance, carefully avoids providing that the corporation may own stock in other companies—yet the practice has been universally ratified by the courts, if not by the implications of legislation. This new tendency to forbid it therefore is merely a return to common-law doctrine. Thus,[2] in 1903 only five States—Connecticut, Delaware, Maine, New Jersey, and Pennsylvania—provided generally that a corporation might own stock in another corporation; two States—Indiana and Minnesota—so provided as to manufacturing or mining companies. In New York,

[1] See below, chap. 16.

[2] MacLeod, p. 203.

Ohio, and other States, a corporation could only own stock in another corporation engaged in a similar business, or a business useful or subsidiary, or in a corporation (New York) with which it was legally entitled to consolidate; but the tendency of recent legislation is precisely opposite on this point, forbidding stockholding by all corporations in similar or competing companies, or more specifically forbidding stockholding in similar or competing companies, as well as stockholding by railroads in railroad companies.

The practice of permitting the free holding of stock by corporations, and especially by holding corporations, has been undoubtedly harmful to the public, and to the public morals, and has been the main cause making possible the speedy acquisition of immense private fortunes. The stockholding trust or the device by which (as in the Rock Island Railway system) a corporation is created for the purpose of holding half the stock of the real corporation and then possibly a third corporation, still to hold half the stock in the second, each of them parting with the other half, obviously makes possible the control of immense properties by persons having a comparatively small real interest. It is a mere arithmetical proposition, for instance, in the case mentioned, that whereas in one corporation it takes one-half of the stock to control it, the first holding company will enable it to be controlled by one-fourth and the second by one-eighth of the original stock. Legislation should properly be much more drastic on this point; but indeed our whole corporation legislation seems rather to have been drawn by able lawyers with a view of protecting the corporation or the person who profits by the abuse thereof, than with a real desire to apply intelligent and practicable remedies to the situation. Thus, until very recently, if now, there has been no legislation along this great line of preventing the holding and governing of corporations by such a system of Chinese boxes; nor has there been up to date any legislation whatever along the other great line of excluding objectionable corporations from doing business in the State,

which any State has, except as to interstate commerce corporations, the unquestioned right to do. This right will, of course, disappear entirely if the recommendation of the present administration for a general Federal corporation law be adopted. The invention of the corporate share enables a clever few to control the many; a small minority to control the vast bulk of the real interest of all property in the country; the problem has obviously proved too great for popular intelligence, for so far little real legislation in the people's interest has been effected. Like most ancient popular prejudices, however, the blind instinct against corporations, common among our Populists, has a strong historical basis; it comes directly down from the prejudice against Mortmain, the dead hand, and from that against the Roman law; for corporations were unknown to the common law, and legislation against Mortmain dates from Magna Charta itself.[1]

It would perhaps be possible for Congress to pass an act forbidding any corporation to carry on its business outside of the State where it is chartered, unless, of course, it got charters from other States; certainly the States themselves might do so. This remedy also has never been tried, and hardly, in Congress, at least, been suggested. Yet it were a more constitutional and far safer thing to do than to cut the Gordian knot by a Federal incorporation act, which will forever securely intrench the trusts against State power. Even if New Jersey or the Island of Guam goes on with its lax corporation laws, permitting its creatures to do business all over the land without proper regulation, this power could thus be instantly taken away from it by such an act of Congress, even if the States themselves remained unready or unwilling to act. Then no corporation could be "chartered in New Jersey to break the laws of Minnesota," even if Minnesota permitted it.

Trusts started as combinations and ended as corporations.

[1] The legislation against trusts, as it existed up to 1900, will be found at the back of vol. II of the "Reports of the United States Industrial Commission."

They began as State corporations, subject both to State and Federal control and regulation; they may end as Federal corporations subject to no control except by Congress. It is too early yet to predict the result, but one assertion may be hazarded, that just as the original Sherman Act against trusts compelled the formation of trusts, so this proposed Federal legislation will compel the formation of Federal trusts, by all but the most local of business corporations.

As to public-service corporations, both the legislation and the principle on which it rests are, of course, quite different. There is no serious difference of opinion that the stock should be paid up in actual money at par nor that dividends at the expense of the public should not be paid on watered stock. More and more the States are putting this sort of legislation into effect. There is also the general provision discussed in a former chapter that the rates or charges of all such corporations may be regulated by law or ordinance; and by far the most notable trend of legislation in this particular has been that franchises of corporations should be limited in time and should be sold at auction to the highest bidder. Thus, by a California law of 1897, all municipal franchises must be sold for not less than three per cent. of the gross receipts and after a popular vote or referendum on the question. It has been matter of party platform for some years that all franchises should thus be submitted to the local referendum. That is, all exclusive franchises whereby rights in the streets, or other rights of the public, are given away to a corporation organized for purposes of gain. In Louisiana, street railway franchises may only be granted on petition of a majority of the abutters, and must be sold at auction for the highest percentage of gross receipts, and so substantially in South Carolina. In Washington, an elaborate statute against discrimination by public-service corporations was passed by the initiative; but as the statute itself omitted the enacting clause the law has been held to be of no effect. Lastly, we will note as the most recent tendency, a more in-

telligent limitation by the States themselves of corporations organized in and by other States, frequently denying to such the right of eminent domain or, as in Massachusetts, to do business or make contracts without making full annual returns and submitting in all respects to the State jurisdiction. Under recent decisions of the Supreme Court, however, this power does not extend to any corporation doing an interstate commerce business; and, of course, under the Federal Incorporation Act, proposed by the present administration, the States would be completely deprived of such power, except, possibly, in so far as Congress may choose to relinquish it to them. How far, independent of such permission by Congress, the ordinary police power would extend, it will be almost impossible to define.

XI

LABOR LAWS

Much of the law affecting employers or combinations of capital has its correlative, or rather equivalent, in combinations of labor; but leaving the matter of combinations for the next chapter, and reserving for this only statutes affecting the individual, we must again insist upon that great cardinal liberty of labor under the English common law, which already gives it a certain privilege and dispenses it from the laws affecting ordinary contracts, that is to say: *the contract of labor, alone of contracts under the English law, may not be enforced.* When we say "enforced" we of course mean that the laborer may not be compelled to carry it out; what, in the law, we call specific performance. This is a matter of such essential importance that it cannot be too strongly accentuated, as it is surprising how ignorant still the popular mind is upon this subject, how little it realizes labor's peculiar advantage in this particular. But it has always been true of the English and American law, at least since that early labor legislation sketched above in chapter 4 which came to a final end at least as early as Elizabeth, that no man could be compelled to work—except, of course, by way of punishment for crime—and more than that, he could not even be compelled to work or carry out a specific contract of labor to which he had bound himself by all possible formality. "Specific performance" is the peculiar process of a court of chancery, and at this point the resistance of the freemen of England we have traced in earlier chapters became absolutely effectual; that is to say, the court of chancery was never allowed to extend its strong arm over

the labor contract. Even that famous first precedent of "government by injunction" discussed by us above (page 74) was resisted in early times, the precedent was not followed, it fell into complete desuetude, and it remained for the case of Springhead Spinning Company *v.* Riley,[1] decided as late as 1868, to extend the injunction process to the prohibition of a strike. And in more recent labor cases it has been found that the line between prohibiting a man from leaving his employment, even under peculiar circumstances, and ordering him to proceed with his contract of employment and to carry it out, is extremely fine, if not indistinguishable.[2]

Now, the reason of this great principle (peculiar, I think, to Anglo-Saxon law) lies at its very root. It is the principle of personal liberty again. To English notions, and to English courts, indefinite labor continued for an indefinite time, or applied to an indefinite number of services, is indistinguishable from slavery; and compulsory labor even under a definite labor contract, such as to work for a week or a month or a year, or in limited directions, as, for instance, to work at making shoes or weaving cloth, when enforced by the strong arm of the law, smacked too much of slavery to be tolerable by our ancestors. Thus it is that, alone of all contracts, if a man sign an agreement to work for us to-day, he may break it to-morrow and will not be compelled to perform it; our only redress is to sue him for damages, and this again because we can only act under the common law. Chancery at this point at least is forbidden to take cognizance of matters affecting personal liberty and labor; and the common law, as has been said, "sounds only in damages." It is only chancery that can compel a man to do or not to do some thing or to carry out a contract.

The other basic principle affecting all questions of labor

[1] L. R. 6 Eq. 551.

[2] For instance, the injunction against the employees of the Southern California Railroad requiring defendants to perform all their regular and accustomed duties "so long as they remain in the employment of the company" (62 Fed. 796), has always been severely criticised.

law is that of freedom of trade or labor, correlative to the principle of freedom of contract as to property right, and, indeed, embodying that notion also. That is to say (perhaps I should say, to repeat) that an Englishman, an American, has a right to labor where and for whom and at what he will, and freely to make contract for such labor, and freely to exercise all trades, and not to be combined against by others, or competed with by a monopoly favored by the state. These last two clauses, of course, belong to our next chapter. This right of contract is not peculiar to the English law, as is the right not to be compelled to personal service, and is much better understood; though it is still earnestly argued by many advocates of union labor that there is no real freedom of contract, or, at least, equality of contract, between the employer and the employee; that therefore "collective bargaining" should be allowed, and that therefore, and furthermore, the wiser or the better organized should be permitted to combine to control the contract or the labor of the individual. But if we hold thoroughly these two principles before our mind we shall have the key to the understanding of our labor legislation; and if we add to that the third principle against conspiracy, we shall have the key to our more complicated legislation against trusts and blacklists and boycotts, and to an understanding of the more difficult questions, affecting labor in combination and the regulation of labor unions.

That there has been a vast deal of interference, or attempted interference, with these principles in modern American legislation goes without saying. The motive or force behind such legislation has pretty clearly two sources: First, the behest or desire of the "Labor interest" or organized labor, the trades-unions themselves; and when we analyze these and their constituents we shall find that it really means only mechanical or industrial labor, not farm or agricultural labor (which is still in numbers the greatest body of labor in the United States), nor, as yet, domestic service

labor, nor what the census calls "personal service," which is probably next in numerical importance, nor clerks; it is a comparatively small class in numbers, this class of skilled mechanical or manufacturing labor, that has brought about this immense mass of legislation of our modern States aimed at improving their own labor conditions; and which therefore, necessarily perhaps, interferes with personal liberty as to the labor contract, or, at least, seeks to regulate it.

The other great influence is rather a motive than a source; we may call it, for want of a better word, the sentimental or the altruistic motive—the moral motive; the forces behind it being mainly of a religious or moral origin, philanthropists, students of ethics, and recently, to a great extent, the women and the women's clubs. The activity of these great forces may be clearly traced through the nineteenth century. It first belonged to the antislavery movement, which directly and historically led to the women's suffrage movement, owing to the fact that at a great antislavery convention in England a woman delegate was refused a seat upon the platform, while her husband, a comparatively obscure person, was recognized as the leading representative from America; and ending of late years in the prohibition movement, to regulate or prohibit the trade in intoxicating liquors, and to exclude the canteen from the army. But in the latest years, in these last very few years indeed, the forces of this category have devoted a large proportion of their "categorical imperative" to labor conditions and the labor contract.

These great forces are entirely impatient of constitutional principles and somewhat indifferent as to the law, while always very desirous of making new statutes themselves. But their combined influence is enormous, so much so that almost any cause to which they devote themselves will in the long run succeed; unless, indeed, their attention is diverted to some other need, for it may be suggested that they are somewhat fickle of purpose. For example, their success in the antislavery movement makes the American

history of the nineteenth century; in the prohibition movement they were, in the middle decades of that century, almost entirely successful, and while apparently there was a set-back in the twenty years of individualistic feeling which marked the growth of the Democratic party to an equality with its great rival, the movement of late years seems to have taken on renewed strength, probably on account of the so-called negro question in the South. And while, as to votes for women, they seem to have made no progress beyond the adoption twenty years ago of women's suffrage in four new Western States and Territories, this last year, it must be admitted, the movement has taken on a new strength in sympathy with the agitation in England. There are now already symptoms of a fourth cause—the reform of marriage, divorce and the laws regulating domestic relations, and the control of children. It is possible that these matters will be taken up actively in coming decades, and we, therefore, reserve them for a future chapter; this new effort is itself partly bound up with the women's suffrage movement, and in its latest manifestation—that of proposing legislation preventing men from marrying without permission from the state—it is a most picturesque example of that absence of constitutional feeling we have just adverted to.

Now this freedom-of-contract principle is one which, of course, legislation attempting to regulate the labor contract is peculiarly liable to "run up against"; and it is, for this reason, not only or chiefly because "labor" is opposed to the Constitution or because the courts are opposed to "labor," that so many statutes, passed at least nominally in the interest of labor, have been by them declared unconstitutional. For instance, it is a primary principle that an English free man of full age, under no disability, may control his person and his personal activities. He can work six, or four, or eight, or ten, or twelve, or twenty-four, or no hours a day if he choose, and any attempt to control him is impossible under the simplest principle of Anglo-Saxon liberty.

Yet there is possibly a majority of the members of the labor unions who would wish to control him in this particular to-day; and will take for an example that under the police power the state has been permitted to control him in matters affecting the public health or safety, as, for instance, in the running of railway trains, or, in Utah, in labor in the mines. But freedom of contract in this connection results generally from personal liberty itself; although it results also from the right to property; that is to say, a man's wages (or his trade, for matter of that) is his property, and the right of property is of no practical use if you cannot have the right to make contracts concerning it.

The only matter more important doubtless in the laborer's eye than the length of time he shall work is the amount of wages he shall receive. Now we may say at the start that in the English-speaking world there has been practically no attempt to regulate the *amount* of wages. We found such legislation in mediæval England, and we also found that it was abandoned with general consent. But of late years in these socialistic days (using again socialistic in its proper sense of that which controls personal liberty for the interest of the community or state) it is surprisingly showing its head once more. In Australasia and more recently in England we see the beginning of a minimum wage system which we must most carefully describe before we leave the subject. There was in the State of Indiana a law that in ordinary unskilled labor in public employment there should be a minimum wage of fifteen cents per hour or twenty-five cents for a man and horse—since declared unconstitutional by Indiana courts: while to-day such labor receives a minimum of two dollars per day in California and Nebraska, one dollar and a quarter in Hawaii, three dollars in Nevada, and "the usual rate" in Delaware and New York,[1] and we are many of us familiar with the practice of towns and villages in New England or New York in passing a vote or town

[1] See above, p. 161; below, p. 213.

ordinance fixing the price of wages at two dollars per day, or a like sum; but this practice, it must be remarked, is in no sense a *law* regulating wages; it is merely the resolution or resolve of an employer himself, as a private citizen might say that he would give his gardener fifty dollars a month instead of forty. And, on the other hand, the Constitution of Louisiana provides that the price of wages shall never be fixed by law. Now it will be remembered that the Statutes of Laborers of the Middle Ages, when they regulated the price of wages, led directly to the result that they made all strikes, all concerted efforts to get an increase of wages, unlawful and even criminal; in fact, it may be said that this attempt to bind the workmen to a wage fixed by law was the very cause of the notion that strikes were illegal, which, indeed, was the English common law down to early in the last century. Moreover, when an English mediæval peasant refused to labor for his three pence a day he might be sent to gaol by the nearest justice of the peace, as, perhaps, some employers would like to do to-day in our South, and which resulted—if not in slavery—in precisely that condition which we call "peonage." Economically speaking, the attempt to regulate wages was, of course, a mistake; politically speaking, it was universally unpopular, and no class was more desirous than the working class themselves of getting rid of all such legislation, which they did in France at the French Revolution, and in England nearly two centuries earlier. Only socialists should logically desire to go back to the system, and in the one modern English-speaking State which is largely socialistic—New Zealand—it is said that the minimum wage law has had the effect that a similar resolve has had in Massachusetts towns: to drive all the old men and all the weaker or less skilled out of employment entirely, and into the poorhouse;[1] for, at a fixed price, it is obvious

[1] In the old town of Plymouth the chairman of the selectmen asked what he should do under vote of town meeting requiring him to pay two dollars a day for all unskilled labor employed by the town. "We have," he said, "about one hundred and twenty old men in Plymouth, largely veterans of

that the employer will employ only the most efficient labor, and the same argument causes some of their more thoughtful friends to dissuade the women school-teachers in New York from their present effort to get their wages or salaries fixed by law at a price equal to that paid a man.[1]

A principle somewhat akin to that of a vote of a town fixing the rate of wages is the recent constitutional amendment in the State of New York (see above, p. 161) which validated the statute requiring that in public work (that is to say, labor for the State, for cities, towns, counties, villages, school districts, or any municipality of the State), or *for contractors employed directly or indirectly by the State or such municipality*, that rate shall be paid which is usual at the time in the same trade in the same neighborhood. This was the earliest statute, which was declared unconstitutional (see above, p. 161). The lack of interest in this tremendously important matter is shown in the fact that not one-third of the voters took the trouble to vote on the amendment at all, and that for three days after the election no New York newspaper took notice of the fact that the amendment had passed. Up to this constitutional amendment the courts of New York, as well as those of California and even of the United States, had resented with great vigor the attempt of statutes to make a crime the permitting of a free American citizen to work over eight hours if he liked so to do. But in New York at least (now followed in Delaware, Maryland, and Oklahoma) it is now settled that so much interference even with the rate of wages may be allowed, and as the percentage of public employment is, of course, very large—covering as it does not only all public contractors,

the Civil War. We have been in the habit of giving them one dollar and a quarter per day. Under this two-dollar vote we cannot do it without bankrupting the town." He was advised to go ahead and still pay them the dollar and a quarter per day and take the chance of a lawsuit, which he did, and so far as the writer knows no lawsuit has ever been brought; but in all cases that would not be the result.

[1] This is law in Utah; but nevertheless a letter from a State government official informs me that women are willing to [and do?] work for a smaller salary.

but all labor in or for gaols or public institutions—it will necessarily, it would seem, drag with it a certain practical regulation of private industry corresponding to the public rules.

In England, the New Zealand experiment has been tentatively begun; that is to say, in the last radical Parliament, in the autumn of 1909, the law was enacted, already referred to, for fixing wages by mixed commission (see above, p. 159); but otherwise than as above there is in the States and Territories of the United States, and in the United States itself, no regulation of wages, even of women or children, and no attempt, as yet, at a minimum wage law.

When we come to hours, the matter is very different. In the first place, we must be reminded that without a constitutional amendment you cannot have any direct or indirect legislation, as to general occupations, on the hours of labor of a man of full age.[1] You can have regulation of the hours of labor of a woman of full age in general employments, by court decision, in three States (Massachusetts, Oregon, and Illinois), the Massachusetts decision, carelessly rendered in 1876, without citing any authority whatever,[2] being based apparently on a vague notion of general sanitary reasons, without argument or apparently due consideration of the historical and constitutional law; but the Oregon case,[3] decided both by the State Supreme Court and by the Federal Court in so far as the Fourteenth Amendment was concerned, after most careful and thorough discussion and reasoning, reasserted the principle that a woman is the ward of the state, and therefore does not have the full liberty of contract allowed to a man. Whether this decision will or will not be pleasing to the leaders of feminist thought is a matter of considerable interest. A similar statute in Illinois

[1] Georgia and South Carolina have such law requiring sixty-six and sixty hours a week respectively in cotton and woollen manufacturing; but their constitutionality has never been tested. For *public* work, see below.

[2] Commonwealth *v.* Hamilton Manufacturing Co., 120 Mass. 383.

[3] Muller *v.* Oregon, 208 U. S. 412. So in Pennsylvania: Commonwealth *v.* Beatty, 23 Penn. C. C. 300.

had been declared unconstitutional twenty years before, largely on the ground that to limit or prohibit the labor of woman would handicap her in her industrial competition with man, pointing out also that the Illinois Constitution itself prescribes and requires that the rights of the sexes should in all respects be identical, save only in so far as jury and militia service and political rights were concerned. A new statute since the Oregon decision has been passed in Illinois and the law was sustained, reversing the older case. On the other hand New York courts take a position squarely contrary,[1] and so in Colorado.[2] The constitutional justification of these decisions must probably be that the health not only of the women themselves, but of the general public, or at least of posterity, is concerned, for, as we shall find more particularly when we discuss general legislation on the police power, to justify an interference with personal liberty of freemen there must, under English ideas, be a motive based upon the health, safety, and well-being of all of the whole community, not merely of the particular citizen concerned. He has the right to work in unhealthy trades at unhealthy times, or under unhealthy conditions, just as he has the right to consume unhealthy food and drink. If it be prohibited, it must be prohibited when it has a direct relation to the general welfare. For example, a railway engineer may be prohibited from working continuously for more than sixteen hours, for that is a direct danger to the safety of the public; but a man may not be prohibited from taking service for long hours as stoker on a steamship, although the life of a stoker be a short one and not over merry. Apparently, however, a woman can be; and indeed there have for a long time been laws prohibiting the labor of women in England and regulating their hours. But then there are laws prohibiting women from serving in immoral occupations, or occupations which are supposed to be dangerous to their morals, as, for instance, many States have

[1] People *v.* Williams, 81 N. E. 778. [2] Bucher *v.* People, 93 Pac. 14.

laws against the serving of liquor, or even of food, by women or girls in places or restaurants where liquor is served, or for certain hours, or in certain places. Very conceivably a law might be passed prohibiting women and girls from the selling of programmes, or attending upon dime museums, or even selling newspapers, or being district messengers; but, as we all know, there are women cabmen in Paris. Would legislation prohibiting such employment to women be unconstitutional? There is already a considerable amount of it. The cases are conflicting, the earlier view, and the view taken in the South and in at least one Federal court, being that such laws are unconstitutional. The modern doctrine, backed up by that public opinion which we have above described as the ethical force, would seem to sustain them. The truth is probably that the legislature must be the sole judge of the expediency of such legislation; where the court can see that it does bear a direct relation to the morals of the young women concerned, or the morals of the general community, it will be sustained as constitutional under the police power, although to that extent interfering with the personal liberty of women and with their means of getting a livelihood.

As to children there is, of course, no question. Laws limiting their labor are perfectly constitutional, and some child-labor laws exist already in all States and Territories except Nevada. The only dispute on the child-labor question is whether such legislation should be Federal, or rather whether the Constitution should be so amended as to make Federal legislation possible. Practically this would meet with a very much wider opposition than is commonly supposed. The writer, acting as chairman of the National Conference of Commissioners on Uniformity of Legislation appointed under laws of more than thirty States of the Union and meeting in Detroit, Michigan, in 1895, brought this matter up under a resolution of the Legislature of the State of Massachusetts requesting him to do so. Nearly every

Southern delegate and most of those from the West and from the Middle States were on their feet at once objecting, and the best he could do was to get it referred to a committee rather than have the Commonwealth of Massachusetts summarily snubbed. This committee, of course, never reported.

Undoubtedly climatic effects, social conditions, and dozens of other reasons make it difficult, if not unwise, to attempt to have the same rules as to hours of labor in all the States of our wide country. Boys and notably girls mature much earlier in the South than they do in the North; schooling conditions are not the same, homes are not so comfortable, the money may be more needed, the general level of education is less. Doubtless there are still areas in the South where on the whole it is better for a child of fourteen to be in a cotton mill than anywhere else he is likely to go, schools not existing. The Southern delegates resented interference with their State police power for these reasons. The Massachusetts Legislature, on the other hand, had in mind the competition of Southern mills, with cheap child labor, quite as much as any desire to benefit the white or negro children of the South; but the writer's experience convinced him that a constitutional amendment on this point is impossible, although one has been repeatedly proposed, notably by the late Congressman Lovering of Massachusetts, and such an amendment is still pending somewhere in that limbo of unadopted constitutional amendments for which no formal cemetery seems to have been prepared.

Even as to men, the labor of the Southern States is notably different from the labor of Lowell or Lawrence, Massachusetts, or even Cambridge; while on the Panama Canal or in most tropical countries the ordinary laborer likes to pretend that he is working eighteen hours a day, although most of the time is spent in eating or sleeping. Nevertheless, under the Federal law, all employees at Panama have to be given the eight-hour day required by the Federal statute, the Supreme Court having upheld that act as constitutional.

It is curious to note, in passing, the alignment of our courts upon this subject of hours of labor and general interference with the freedom of contract of employment. The Western and Southern States are most conservative; that is to say, most severe in enforcing the constitutional principles of liberty of contract as against any statute. The courts of the North and East are more radical, and the courts of Massachusetts and the United States most radical of all. I account for this fact on the ground that where the legislatures are over-radical, the courts tend to react into conservatism, and as the Western legislatures try many more startling experiments than are usually attempted in Massachusetts or New Jersey, the more intelligent public opinion has to depend on the courts to apply the curb. All this, of course, is a great mistake; for it forces undue responsibility on the courts, at least tends to control in an improper way the appointment of judges, and at best forces the most upright judge into a position where he should not be put—that of being a kind of king or lord chamberlain, with power to set aside improper or wrong legislation.

With these preliminary remarks we are now prepared to examine the legislation as it exists to-day (1910); cautioning our readers that this subject, as indeed all others concerning labor legislation, is so often tinkered in all our States as to make our statements of little permanent value, except that restrictions once imposed are rarely repealed. We may assume, therefore, that the law is at least as radical as it is herein presented.

The hours of labor of *adults*, males, in ordinary industries remain as yet unrestricted by law in any State of the Union; but several States have laws making a certain number of hours a day's work in the absence of contract;[1] and

[1] Thus eight hours (California, Connecticut, Illinois, Indiana, Missouri, New York, Ohio, Pennsylvania, Wisconsin); ten hours (Florida, Maine, Michigan—with pay for overtime—Minnesota, Montana, Maryland—for manufacturing corporations—Nebraska, New Hampshire, Rhode Island, South Carolina—in cotton and woollen mills—in New Jersey, fifty-five hours a week in factories; in Georgia eleven hours in manufacturing establishments,

New York and a few other States have an eight-hour day in "public" work—that is to say, work directly for the State or any municipality or for a contractor undertaking such work.[1]

The labor of women (in mechanical trades, factories and laundries in Illinois, or in mercantile, hotel, telegraph, telephone, etc., as well, in Oregon) for more than a limit of ten hours per day in Illinois, or nine in Oregon, is prohibited and made a misdemeanor; and both these statutes have been held constitutional. But in many other States the hours of labor in factories or manufacturing establishments, even of adult women, are now regulated; while the labor of children, as we shall find, is regulated in nearly all. Thus, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, and Washington have a ten-hour day in all manufacturing or mechanical employments for women of any age, which in Connecticut, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Oregon, Pennsylvania, and Washington extends to mercantile avocations also, in Louisiana only to specified dangerous trades; in Wisconsin, eight hours; and in Connecticut, Maine, Minnesota, New Hampshire there may not be more than fifty-eight hours a week, or in Massachusetts and Rhode Island, fifty-six, and in Michigan and Missouri, fifty-four. Arizona has an eight-hour day in laundries.

And these laws are extended to specified occupations, viz., in Connecticut to manufacturing, mechanical, and mercantile; in Illinois, mechanical, factory, or laundry; in Louisiana,

or from sunrise to sunset by all persons under twenty-one, mealtimes excluded (see below). But these laws do not usually apply to agricultural or domestic employment or to persons hired by the month.

[1] In public work, that is, work done for the State, or any county or municipality or for contractors therefor, the eight-hour day is prescribed (California, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, Utah, Washington, West Virginia, Wisconsin, Wyoming, and the United States). But the provisions for overtime and compensation for overtime differ considerably.

unhealthful or dangerous occupations except agricultural or domestic; in Maine, mechanical and manufacturing except of perishable products; in Maryland, special kinds of manufactories; in Massachusetts, manufacturing, mechanical, mercantile, and restaurants; in Michigan, Minnesota, and Missouri, manufacturing, mechanical, and mercantile or laundries; in Nebraska, manufacturing, mercantile, hotel, or restaurant; in New Hampshire, New York,[1] North Dakota, Oklahoma, Rhode Island, manufacturing and mechanical; in Tennessee and Virginia, manufacturing only; in Washington and Oregon manufacturing, mechanical, mercantile, laundry, hotel, or restaurant, and in Wisconsin, mechanical or manufacturing. Georgia and South Carolina regulate the labor of women as they do of adult men[2] in factories. Such laws of course would not be unconstitutional or, if so, not for the reason of sex discrimination.

Now all these laws arbitrarily regulate the hours of labor of women at any season without regard to their condition of health, and are therefore far behind the more intelligent legislation of Belgium, France, and Germany, which considers at all times their sanitary condition, and requires a period of rest for some weeks before and after childbirth. The best that can be said of them, therefore, is that they are a beginning. No law has attempted to prescribe the social condition of female industrial laborers, the bill introduced in Connecticut that no married woman should ever be allowed to work in factories having failed in its passage.

The hours of labor of minors, male and female, are limited in all States, except Florida, Missouri, Montana, Nebraska, Nevada, New Mexico, South Carolina, Texas, Vermont, Utah, Washington, West Virginia, and Wyoming, particularly in factories and stores, usually under an age limit of sixteen, to ten hours per day or fifty-eight hours a week.[3] But in Ala-

[1] Possibly unconstitutional. See above. [2] See above.

[3] Connecticut, Maine, Massachusetts (in manufacturing, fifty-six) Mississippi, New Hampshire (nine hours, forty minutes), Pennsylvania. In others, sixty hours a week (Alabama, Arkansas, Indiana, Iowa, Kentucky,

bama, Arkansas, and Virginia, the age is as low as fourteen, and in California, Indiana,[1] Louisiana, Maine,[1] Massachusetts, Michigan, North Carolina, Ohio,[1] Pennsylvania,[1] and South Dakota,[1] it is eighteen. In California, Delaware, Idaho, and New York, it is nine hours, and in Colorado, District of Columbia, Illinois, Indiana, Kansas, New York,[2] North Dakota, Ohio, and Oklahoma, it is as low as eight hours a day, though the laws in several States, as in New York, are contrary and overlie each other. A corresponding limit, but sometimes less, is fixed for the week; that is, in the nine-hour States and some others, weekly labor may not exceed fifty-four hours or less.[3]

Night work in factories, etc., is prohibited in nearly all the States mentioned and in others.[4] Many States require working papers or certificates of age of the person employed, and there are often also certificates as to the required amount of schooling when necessary. Indeed it may be said that we are on the way to the German system of having time cards or certificates furnished by State machinery for all industrial workers, and such a system will, of course, be absolutely necessary should the State ever engage in old-age insurance, as has been done in Germany and England; though the prac-

Maryland (in Baltimore only), Minnesota, New York, Oregon, South Dakota Tennessee, Wisconsin).

[1] As to females only (Indiana, Maine, Ohio, Pennsylvania, South Dakota).

[2] In factories (New York).

[3] Fifty-four hours (Delaware, Idaho, Michigan, New York), fifty-five hours (New Jersey), fifty-six hours (Massachusetts, Rhode Island), forty-eight hours (District of Columbia, Illinois, Kansas, Ohio, Oklahoma), sixty-six hours (North Carolina).

[4] Thus, night labor in factories to minors under fourteen (Arkansas, Georgia, Massachusetts, North Carolina, Texas, Virginia), twelve (South Carolina), eighteen (New Jersey), or sixteen (Alabama, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin) is prohibited in factories or mercantile establishments (Connecticut, Iowa, Kansas, Michigan, New York), or any gainful occupation (Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Minnesota, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Wisconsin). In South Carolina the law only protects children under twelve from night labor in mines and factories. So in some as to all females only (Indiana), females under eighteen (Louisiana, Michigan, Ohio, Oklahoma, Pennsylvania), twenty-one (New York), and to any minor between 10 P. M. and 6 A. M. (Massachusetts).

tical difficulty of such a scheme would have been thought by our fathers insuperable on account of our Federal and State system of government, and the necessary free immigration of American workmen from one State into another.

These laws will be found summarized in full in *Legislative Review*, No. 5, of the American Association for Labor Legislation, by Laura Scott ("Child Labor"), and in No. 4, by Maud Swett ("Woman's Work").

It will be seen that in all respects practicable with our necessary system of individual liberty, doubly guaranteed by the constitutions, State and Federal, we are quite abreast of the more intelligent legislation of European countries as to hours of labor, women's and children's, except in a few States. But it should be remembered that these are largely agricultural or mining States, and doubtless when the abuse of child and woman labor presents itself it will be met as frankly and fairly there as in others.

On the constitutionality, if not the economic wisdom of laws regulating the hours of labor of women, at least of adult years, there still is decided difference of opinion. Logically it would perhaps seem as if those who believe in the "Woman's Rights" movement of uniform function for women and men, should be opposed to all such legislation; both on theoretical grounds as being a restraint of personal liberty, and as unequal legislation handicapping woman in her industrial competition with man. This was certainly the earlier view; but under the influence of certain voluntary philanthropic associations the tendency at present seems to be the other way.

The States which have laws prohibiting any labor of children whatever, even, apparently, agricultural or domestic,[1]

[1] The New York law applies to "any business or service," but I assume this cannot mean service rendered to the parents in the house or on the farm; in fact it may be generally assumed that all these laws, even when they do not say so, mean only employment for hire; the Oregon and Wisconsin laws, to "any work for compensation"; the Washington law to "any inside employment, factory, mine, shop, store, except farm or household work." Arkansas, Delaware, Idaho, and Wisconsin, to "any gainful occupation";

are: Arizona, Arkansas, Connecticut, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Maryland, Missouri, Massachusetts, Minnesota, Montana, Nebraska, New York, North Dakota, Oregon, Washington, and Wisconsin.

And the age limit fixed for such general employment is (without regard to schooling) under twelve, in Idaho and Maryland; under fourteen in Delaware, Illinois, and Wisconsin; and under fourteen for boys and sixteen for girls in Washington, if without permit, and under fifteen, for more than sixty days without the consent of the parent or guardian in Florida; in other States the prohibition rests on educational reasons, and covers only the time of year during which schools are in session; thus, under eight during school hours, or fourteen without certificate (Missouri); under fourteen during the time or term of school sessions (Connecticut, Colorado,[1] Massachusetts, Idaho, Kansas, Kentucky, Minnesota, New York, North Dakota); or under fourteen during actual school hours (Arizona,[2] Kentucky, Nebraska, Oregon); or under fifteen in Washington,[1] and under sixteen as to those who cannot read and write (Colorado, Connecticut,[3] Illinois,[3, 4]) or have not the required school instruction (Idaho, New York[1, 4]), or during school hours (Arkansas, Montana[1]), or who have not a labor permit (Maryland, Minnesota, Wisconsin). This résumé shows a pretty general agreement on the absolute prohibition of child labor under fourteen, or under sixteen as to the uneducated; and the penalty is in most States only a fine inflicted on the employer, or, in some cases, the parent; but in Florida and Wisconsin it may be imprisonment; as it is in Alabama for a second offence.

But more States fix a limit of age in the employment of children in factories or workshops, and particularly in

Maryland, to "any business," etc., except farm labor in summer; Colorado, to labor for corporations, firms, or persons; the other State laws to any work.

[1] Without schooling certificate.
[2] Without certificate of excuse.
[3] Unless the child attends a night school.
[4] Without age certificate.

mines; not so usually, however, in stores.[1] The age of absolute prohibition is usually fixed at fourteen or at sixteen in the absence of a certain amount of common-school education. These States are: Alabama,[2] Arkansas,[3, 9] California,[4, 9] Colorado,[5] Connecticut,[5] Delaware,[5, 6] District of Columbia,[7, 9] Florida,[3, 9] Georgia,[8] Illinois,[5, 9] Indiana,[9, 10] Iowa.[11, 9] Kansas and Kentucky[8] forbid factory labor for children under fourteen or between fourteen and sixteen without an age certificate or an employment certificate; Louisiana[9] has the usual statute, that is, absolute prohibition under fourteen and age certificate required for those between fourteen and sixteen, or, in the case of girls, between fourteen and eighteen, and the law applies to mercantile occupations where more than five persons are employed; the Maine statute is similar, but children above fifteen may work in mercantile establishments without age or schooling certifi-

[1] The law does apply to "mercantile establishments" (Alabama, Arkansas, California, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia).

[2] Absolute prohibition only under twelve. School and age certificate from twelve to sixteen; age certificate from sixteen to eighteen.

[3] The ages are fourteen and eighteen respectively, or sixteen in stores during school hours; in Florida, twelve, or when school is not in session, without an age, schooling, and medical certificate.

[4] Absolute prohibition under twelve or from twelve to fourteen during the school term or under sixteen to those who cannot read and write, and the law applies to mercantile establishments, hotel and messenger work, etc., making expressly the usual exemption of agricultural or domestic labor.

[5] Absolute prohibition under fourteen; from fourteen to sixteen without certificate (Connecticut, Illinois, Kansas, Kentucky), and medical certificate if demanded (Delaware).

[6] Any gainful occupation under fourteen. Except canning fruit, etc. (Delaware).

[7] Any business or occupation during school hours, except in the United States Senate, and the age is absolute prohibition under twelve; twelve to fourteen without a dependency permit, and fourteen to sixteen without schooling certificate.

[8] Absolute under twelve; twelve to fourteen without schooling certificate; fourteen to eighteen without age and schooling certificate except as to those who have already entered into employment. Does not apply to mines.

[9] This law applies to mercantile establishments, etc., as well.

[10] Absolute under fourteen, or under sixteen to those who cannot read and write.

[11] Prohibition is absolute under the age of fourteen, and applies to employment in mercantile establishments as well, or stores where more than eight people are employed.

cate, which is required of all those under sixteen in manufacturing or mechanical employment; in Maryland,[1] the prohibition age is still twelve, and the law applies to any business except farm labor in the summer; in Massachusetts,[1] absolute prohibition below fourteen, fourteen to sixteen without age or schooling certificate, and fourteen to eighteen, who cannot read and write; in Michigan,[1] absolute prohibition under fourteen, or sixteen without written permit; in Minnesota, the same ages, but the law applies to any employment; in Mississippi the ages are twelve and sixteen; in Missouri, absolute prohibition under eight, or fourteen without school certificate. New Hampshire [1] lags behind and has only an absolute prohibition to children under twelve, or during school under fourteen, or under sixteen without schooling certificate. In New Jersey, under fourteen, or sixteen with medical certificate; Nebraska [1] and New York,[1] the usual absolute prohibition under fourteen, or under sixteen without employment certificate; North Carolina, under twelve, with an exception of oyster industries; North Dakota,[1] fourteen, or from fourteen to sixteen without employment certificate. In Ohio,[1] Oklahoma, Oregon,[1] Pennsylvania,[1] and Rhode Island,[1] the laws are practically identical, fourteen, or sixteen with certificate of schooling. South Carolina, absolute prohibition only under twelve, and not even then in textile establishments if the child has a dependency certificate. South Dakota,[1] under fifteen when school is in session; Tennessee, absolute under fourteen; Texas, under twelve, or under fourteen to those who cannot read and write unless the child has a parent to support. Vermont's limitation is purely educational; no child under sixteen can be employed in factories or mines who has not completed nine years of study. In Virginia [1] from March 1, 1910, there is absolute prohibition under fourteen except as to children between twelve and fourteen with a dependency certificate; Washington, under fifteen without schooling certificate, or in stores, etc., twelve.

[1] This law applies to mercantile establishments, etc., as well.

West Virginia, twelve, or fourteen when school is in session. Utah and Wyoming have no legislation except as to mines, nor do Colorado and Idaho protect women in them. Yet these are the four woman-suffrage States.

The laws as to labor in mines are naturally more severe; although in some they are covered by the ordinary factory laws (Colorado, Florida, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin). Female labor is absolutely forbidden in mines or works underground in Alabama, Arkansas, Illinois, Indiana, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, Utah, Washington, Wyoming, and West Virginia,—in short, in most of the States except Idaho, Kansas, Iowa, Kentucky, Virginia, Wyoming, where mines exist; and the limit of male labor is usually put at from fourteen (Alabama, Arkansas, Idaho, Indiana, Missouri, Ohio,[1] South Dakota, Tennessee, Utah, Wyoming) to sixteen (Illinois, Missouri,[2] Montana, New York, Oklahoma, Pennsylvania, Washington); or twelve (North Carolina, South Carolina, West Virginia), even in States which have no such legislation as to factories.

The laws as to elevators,[3] dangerous machinery,[4] or dangerous employment generally,[5] are even stricter, and as a rule apply to children of both sexes; the Massachusetts standard being, in the management of rapid elevators, the age of eighteen, in cleaning machinery in motion, fourteen, etc.; in other States, sixteen to eighteen.[6] The labor of all women in some States, and of girls or women under sixteen or eighteen in other States, is forbidden in occupations which

[1] Fifteen during school year.
[2] Of those who can read and write.
[3] Indiana, Massachusetts, New York, Rhode Island, Kansas, Oregon.
[4] Connecticut, Iowa, Missouri, Oregon, Louisiana, New York.
[5] Illinois, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Wisconsin.
[6] Indiana, Iowa, Louisiana, New Jersey, New York, South Carolina.

require continual standing.[1] Females,[2] or minors,[3] or young children[4] are very generally forbidden from working or waiting in bar-rooms or restaurants where liquor is sold, and in a few States girls are prohibited from selling newspapers or acting as messengers.[5] The Northern States have a usual age limit for the employment of children in ordinary theatrical performances, and an absolute prohibition of such employment or of acrobatic, immoral, or mendicant employment. But in some States it appears there is only an age limit as to these.[6]

The hours for railroad and telegraph operators are limited in several States, but rather for the purpose of protecting the public safety than the employees themselves.[7] The following other trades are prohibited to women or girls: Bootblacking,[8] or street trades generally[9]; work upon emery wheels, or wheels of any description in factories (Michigan), and in New York no female is allowed to operate or use abrasives, buffing wheels, or many other processes of polishing the baser metals, or iridium; selling magazines or newspapers in any public place, as to girls under sixteen,[10] public messenger service for telegraph and telephone companies as to girls under nineteen.[11]

Leaving now the question of general employment, where no general laws limiting time or price would seem to be

[1] Illinois (under sixteen), Michigan (all), Minnesota (sixteen), Missouri (all), New York (sixteen), Ohio (all), Oklahoma (sixteen), Wisconsin (sixteen), Colorado (all over sixteen).

[2] Iowa, Louisiana, Michigan, Missouri, New Hampshire, New York, Vermont, Washington (except the wife of the proprietor or a member of the family).

[3] Arizona, Connecticut, Georgia, Pennsylvania, Idaho, Maryland, Michigan, Missouri, New Hampshire, South Dakota, Vermont.

[4] Florida, Illinois, Massachusetts, Missouri, Nebraska.

[5] New York, Oklahoma, Wisconsin.

[6] California, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, New York, Oregon, Rhode Island, (sixteen years); Colorado, District of Columbia, Florida, Illinois, Kansas, New Hampshire, Virginia, Wisconsin, Wyoming (fourteen); Connecticut, Georgia, (twelve); Delaware, Indiana, Louisiana, Massachusetts, West Virginia (fifteen); Minnesota, New Jersey, Pennsylvania, Washington (eighteen).

[7] Colorado, New York.

[8] District of Columbia, Wisconsin.

[9] District of Columbia, Wisconsin.

[10] New York, Oklahoma, Wisconsin.

[11] Washington.

constitutional, except in certain cases as to the employment of women and in all cases that of children, and going to special occupations, we shall find quite a different principle; for in a special occupation known to be dangerous or unhealthy, certainly if dangerous or unhealthy to the general public, it has always been the custom and has always been constitutional with us to control conditions by statute. The question of what is a dangerous or unhealthy occupation to the public rather than merely to the persons employed is, of course, a difficult one; and the Supreme Court of the United States have split so closely on this point that they have in Utah decided that mining was an occupation dangerous to the public health, and in New York that the baking of bread was not. That is to say, that the condition of bakeshops bore no relation to the general health of the community. One might, perhaps, have expected that they would have decided each case the other way; but we must take our decisions as we get them from the Supreme Court, reserving our dissent for the text-books. In any event, it can be seen that the line is very close, certainly in the case of adult male labor. The same statute as to mines existed in Colorado that the United States Supreme Court sustained in Utah. The Colorado Supreme Court had declared it unconstitutional, and after the decision of the United States Supreme Court they continued to declare it unconstitutional, simply saying that the United States Supreme Court was wrong. Anyhow, it is obvious that in trades which involve a great mass of the people, or affect the whole community, or particularly where there are definite dangers, such as noxious vapors or tuberculosis-breeding dust, it will be constitutional, as it is common sense, to limit the conditions and even the hours of labor of women or men, as well as children. Students interested in such matters will find the universal legislation of the civilized world set forth in the invaluable labor-laws collection of the government of Belgium; and he will find that all countries of the world do regulate the hours of labor

as well as the conditions, in all such trades, and we should not remain alone in refusing to do so.

The difficulty of regulating the hours of farm labor is, of course, obvious, and so far as I know, no attempt has yet been made. The same thing remains still true of domestic labor, though it has been more questioned. It should be noted that both domestic labor and farm labor belong to the class of what we call indefinite service. Now, indefinite service must always be regulated very carefully as to the length of the contract, which is never to be indefinite; that is to say, if it be both indefinite in the services rendered and in the time during which they are to last, it is in no way distinguishable from slavery. For instance, in Indiana, many years before the Civil War, there was an old negro woman who was induced to sign a contract to serve in a general way for life; that, of course, was held to be slavery. More recently the United States Supreme Court has held that a contract imposed upon a sailor whereby he agreed to ship as a mariner on the Pacific coast for a voyage to various other parts of the world and thence back was a contract so indefinite in length of time as to be unenforceable under free principles, although a sailor's contract is one which in a peculiar way carries with it indefinite service. And a contract "*à tout faire*" even for a week might be held void.

In all these matters the labor of women, and even that of children, will very often control the hours of labor of men; for instance, in the mills of New England, more than half the labor is not adult male; yet when any large class of the mill's operatives stop, the whole mill must stop; consequently, a law limiting the labor of women and children to fifty-six hours a week will be in practice enforced upon the adult males employed in the same mill.

Continental legislation has gone far beyond us in all these important particulars. In most countries the conditions surrounding the labor of women, particularly married women, are carefully regulated by law. She is not allowed to go

back to the mill for a certain period after childbirth, and in many more particular respects her health is carefully looked after. Such legislation would possibly be impossible to enforce with our notions in America. The most interesting of all is perhaps the attempt made in the State of Connecticut within a few years to improve social conditions by providing that no married woman should be employed in factories at all. The bill was not, of course, carried, but it raises a most interesting sociological question. Ruskin probably would have been in favor of it. He described as the very last act of modern barbarism for the woman to be made "to shriek for a hold of the mattock herself." It was argued in Connecticut that the employment of married women injured the health of the children, which is perfectly true. Indeed, the death-rate in England is very largely determined by the fact whether their mothers are employed in mills or not. It was also argued that her competition with man merely halved his wages; that if no women were employed, the men would get much higher wages. On the other side it was argued that the effect of the law would be largely immoral because it would simply prevent women from getting married. Knowing that after marriage they would get no employment, they would simply dispense with the marriage ceremony; for it is obvious that under such legislation a man living with a woman unmarried could get double wages, which would be halved the moment he made her his wife. This last was evidently the view which prevailed; and so far as I know, no such law has in the civilized world yet been enacted, though there is doubtless a much stronger social prejudice against women entering ordinary employments in some countries than in others.

The constitutional question underlying all this discussion was perhaps best set forth by an experiment of the late Mr. Edward Atkinson, which he always threatened to bring into the courts, but I believe did not do so. "An Englishman's house is his castle"; an English woman's house is her castle. Atkinson proposed that a woman of full age, living in her own

house, should connect her loom or spindles by electric wire to the nearest mill or factory, and then proceed to weave or spin *more* than the legal limit of nine hours per day. Would the state, under the broadest principles of English constitutional liberty, have the right to come in and tell her not to do so; particularly when the man in the next house remained free? Up to this time there is no doubt that a factory, a large congregation of labor, under peculiar conditions, presents a different question and a different constitutional aspect from that of the individual. This, indeed, is the principle which must justify the constitutional regulation of sweat-shops, as to which we will speak next.

The sweat-shop is the modern phrase for a house, frequently a dwelling, tenement, or home, not a factory, and not under the ownership or control of the person giving out the employment.

Now a factory may obviously be regulated under ordinary police principles; but when the first great case came up as to regulating labor in a man's own home, even though it was but one floor of a tenement, it was decided by the highest court of New York to be unconstitutional. The case was one concerning the manufacture of cigars, which by the statute was prohibited in tenement houses on any floor partly occupied for residence purposes.[1] Nevertheless it may be questioned whether, with the advancing social feeling in such matters, legislation would not be now sustained when clearly aimed at sanitary purposes, even though it interfered with trades conducted in a man's dwelling house. I hold that it is quite as possible for the arm of the state to interfere to prevent the baking of bread in bedrooms, for instance, as it is to seize upon clothing which has been exposed to scarlet fever. A man's home, under modern theories, is no more sacred against this police power than is his body against vaccination; and the last has been decided by the Supreme Court of the United States.[2]

[1] In re Jacobs, 98 N. Y. 98. See the author's "Handbook to the Labor Law of the U. S.," p. 151.

[2] Massachusetts *v.* Jacobson, 197 U. S. 11.

At all events, legislation may be aimed against sweat-shops which in any sense resemble factories—that is, where numbers of persons not the family of the occupier are engaged in industrial labor; so in Pennsylvania it has been extended to jurisdiction over shops maintained in the back yards of tenements; while in most States the statute applies to any dwelling where any person not a member of the family is employed, and general legislation against sweat-shops already exists in the twelve north-eastern industrial States from Massachusetts to Missouri and Wisconsin, leaving out only Rhode Island.

The Massachusetts law as at present forbids work upon clothing except by members of the family in any tenement without license, and thereupon subjects the premises to the inspection of the police, and registers of all help must be kept. Whoever offers for sale clothing made in a tenement not licensed must affix a tag or label two inches long bearing the words "Tenement Made," with the name of the State and city or town in which the garment was made. Moreover, any inspector may report to the State board of health that ready-made clothing manufactured under unhealthy conditions is being shipped into the State, which "shall thereupon make such orders as the public safety may require." [1] In New York the law applies to the manufacture of many articles besides clothing, such as artificial flowers, cigarettes, cigars, rubber, paper, confectionery, preserves, etc. A license may be denied to any tenement house if the records show that it is liable to any infectious or communicable disease or other unsanitary conditions. Articles not manufactured in tenements so licensed may not be sold or exposed for sale, and there is the same law as in Massachusetts as to goods coming in from outside the State, and there is the same exemption of apartments occupied by members of the family, and even then it appears that they are subject to the visitation of the board of health and must have a

[1] Massachusetts R. L., 106, secs. 56 to 60 inclusive.

permit. The Pennsylvania law is similar to the New York law, and in addition, all persons are forbidden to bargain for sweat-shop labor, that is, labor in any kitchen, living-room, or bed-room in any tenement house except by the family actually resident therein, who must have a certificate from the board of health. The Wisconsin law apparently applies to persons doing the work in their own homes, who must have a license like anybody else, and the owner of the building is liable for its unlawful use. The Illinois and Maryland laws are similar to the New York law, while the Michigan statute resembles that of Wisconsin, apparently applying to members of the family as well. The Missouri law forbids the manufacture of clothing, etc., in tenements by more than three persons not immediate members of the family, while the New Jersey and Connecticut statutes content themselves with making such manufacture by persons not members of the family subject to inspection.

It is a curious commentary that the very dream of the social reformers of only twenty years ago is so rudely dispelled by the march of events; for in the late nineties it was the hope of the enthusiast, particularly the student in electrical science, that the factory system might in time be done away with, and by the use of power served from long or short distance over wires to a man's own habitation, all the industries of manufacture might be carried on in a man's own home—just as used to be the case with the spinners and weavers of olden time. Far from being a hope, it turns out that this breeds the very worst conditions of all, and the most difficult to regulate by law. For modern homes for the most part are not sanitary dwellings in the country, but single floors or parts of floors in huge tenement houses in great cities. It is probable to-day, therefore, that there is a perfect reversal of opinion, and that the social reformer now dreams of a world where no work is permitted in the home, other than ordinary domestic avocations, but all is compelled to be done in factories under the supervision of public

authorities—a splendid example of the dangers of hasty legislation; for had we carried into law the eager desire of the reformers of only twenty years since, we should, it appears, have been on a hopelessly wrong track.

It should be noted, however, that the reform of conditions is very largely arrived at by a different path—that of the *building* laws in our cities. No more arbitrary rule exists to-day or was ever in history than the despotic sway of a board or commission created under modern police-power ideas. In everything else you have a right to a hearing, if not an appeal to the common-law courts and a jury; but the power of a building inspector is that of an Oriental despot. He can order you summarily to do a thing, or do it himself; or destroy or condemn your property; and you have no redress, nor compensation, nor even a lawsuit to recover compensation. Therefore, if the sweat-shop reformers may not constitutionally regulate the conditions and business of sweating so far as they would like to go, they can turn about and directly regulate the actual building of residences where the trade is carried on. They can require not only so many cubic feet of air per person in the sweat-shop, but so many cubic feet of air per person in every bedroom; as Ruskin said, not only, of grouse, so many brace to the acre, but of men and women—so many brace to the garret. A California law[1] once made it a criminal offence for any person to sleep with less than one thousand feet of air in his room for his own exclusive use! It is indeed a crime to be poor.

This legislation to reform sweat-shops is a field which has been almost entirely cultivated by what I have termed the moral reformers, with little or no help from organized labor. One's observation is that organized labor has been mainly concerned with the price of wages, the length of hours, and with the closed shop; it has devoted very little of its energies to factory or trade *conditions*, except, indeed, that it has been very desirous of enforcing the union label, on

[1] See Ah Kow, Nunan, 5 Sawyer, 552.

which it asserts that union-made goods are always made under sanitary and moral conditions, and implies that the goods of "scab" manufacturers are not so.

The usual sweated trades in this country are the manufacture of clothing, underwear, tobacco, and artificial flowers. There has also been considerable regulation of laundries and bakeries, but not because they are what is commonly called sweated trades.

The bulk of factory legislation is too vast for more than mention in a general way. It fills probably one-fourth in mass of the labor laws of the whole country, and applies in great and varying detail to the general condition of factories, workshops, and in most States to large stores—department stores—using the word in the American sense. It may be broadly analyzed as legislation for the construction of factories, for fresh air in factories, for general sanitary conditions, such as the removal of dust and noxious gases, white-washing, sanitary appliances, over-crowding, stair-cases, fire-escapes, and the prohibition of dangerous machinery. As has been said, it was begun in Massachusetts in the fifth decade of the last century, based originally almost entirely on the English factory acts, which were bitterly attacked by the *laissez-faire* school of the early nineteenth century, but soon vindicated themselves as legitimate legislation in England, although not even there—still less in our States—have we gone so far as the Continental countries.

Closely connected with this may be mentioned that vast domain of law which is known as employers' liability. Under the old strict common-law rule, a servant or employee could never recover damages for any injury caused in whole or in part by his own negligence, by the negligence of a fellow servant or even by defective machinery, unless he was able to prove beyond peradventure that this existed known to the employer and was the sole and direct cause of the accident. As is matter of common knowledge, the tendency of all modern legislation, particularly the English and

our own, has been to chip one corner after another off these principles. The fellow-servant rule has been very generally abolished by statute, or in many States fellow servants have been defined and divided into classes so that the master is not relieved of liability when the injury to the servant is caused by the negligence of a servant not in actual fact his fellow, *i. e.*, employed with him in his own particular work. In like manner the exemption for contributory negligence has been pared down and the liability for dangerous or defective appliances increased, practically to the point that the master becomes the insurer of his machinery in this particular. The recent English statute goes to the length of putting the liability on the employer or on an employment fund in all cases.

The writer is strongly of opinion that this radical reform is, so far as constitutional, the end to be aimed at. The immense expense and waste caused by present litigation, the complete uncertainty both as to liability and as to the amount of damages, the general fraud, oppression, and deceit that the present system leads to, and finally its hideous waste and extravagance, are all reasons for doing away with it entirely. He believes that for the employer's own benefit if there were a statute with a definite scale of damages, providing definitely, and as part of the employment contract if necessary, with a certain small deduction from the wages, that there should be insurance, that the master should be actually liable on a fixed scale for all injuries suffered while in his employment not in disobedience to his orders or solely and grossly negligent, it would be far better both for employer and employee. To-day it is possible that in many cases the employee gets no damages or is cheated out of them, or they are wasted in litigation expense (the Indiana Bar Association reported this year that only about thirty per cent. of the damages actually recovered of the employer reaches the party injured); while on the other hand the master can never know for how much he is going to be liable, and in the rare cases which get to

a jury they are apt to find an excessive verdict. It is the custom with most gentlemen to pay a reasonable allowance to any servant injured while in their employ, unless directly disobedient of orders. There is no practical reason why this moral obligation should not be embodied in a statute and extended to everybody. The scale of damages should of course be put so low as not to encourage persons to expose themselves, still less their own children, to injury in the hope of getting monetary compensation. But although in India we are told the natives throw themselves under the wheels of automobiles, it is not probable that in American civilization there would be serious abuse of the law in this particular. Five thousand dollars, for instance, for loss of life or limb or eye, with a scale going down, as does the German law, to a mere compensation for time lost and medical attendance in ordinary injuries, would be sufficient in equity and would surely not encourage persons voluntarily to maim themselves.

The next great line of legislation concerns the mode of payment of wages. The *amount*, as has been said, is never regulated; but it has been customary for nearly a century for the law to require payment in cash, or at least that it be not compulsorily made in goods or supplies, or still worse in store orders. This line of legislation is commonly known as the anti-truck laws and exists in most States, but has been strenuously opposed in the South and Southwest as interfering with the liberty of contract, so that in those more conservative States the courts have very often nullified such legislation. It may be summarized as follows:

(1) Weekly or time payment laws. These exist in more than half the States, and are always constitutional as to corporations, but are possibly unconstitutional in all States except Massachusetts when applied to private employers.

(2) Cash-payment laws, requiring payments to be made in actual money. These statutes are commonly combined with those last mentioned and are subject to the same con-

stitutional objections. As a part of them, or in connection with them, we will put the ordinary anti-truck laws—that is, legislation forbidding payment in produce or supplies or commodities of any kind. Finally, the store-order laws forbidding payment to be made in orders for indefinite supplies on any particular store, still less on a store owned or operated by the company or employer. Such laws have sometimes been held unconstitutional in all particulars, sometimes when they apply only to certain industries, as, for instance, mines. In the writer's opinion they are never constitutional when applied to corporations, nor are they class legislation when applied to mines, for the reason that it is well known that mines are situated in remote districts where there are few stores, and that the maintenance of a company store has not only led to much cheating but to an actual condition of peonage. That is to say, the miners would be held in debt and led to believe that they could not leave the mine or employment until the debt was liquidated. Belonging usually to the most ignorant class, it is matter of common knowledge that this has been done, and that Poles, negroes, or others of the more recent immigrants have been permanently kept in debt to the company store or by advances or in other ways, as for rent or board.

(3) Closely allied to such legislation, of course, is the legislation against factory tenements or dwellings, but there is probably less real abuse here, and therefore a greater constitutional objection against laws forbidding houses, especially model houses, to be built and rented by the employer. Such efforts, unfortunately, have not usually been popular. Far from helping labor conditions, they seem to have caused great resentment, as was notably the case in Pullman, Illinois, and very recently in Ludlow, Massachusetts. It may be that the American temperament prefers its own house, and resents being compelled to live in a house, however superior, designed for him and assigned to him by his employer.

(4) The next matter which has evoked the attention of philanthropists and the angry resentment of the persons they supposed they were trying to benefit, is that of the benefit or company insurance or pension funds. The principle of withholding, or contracting with the employees to withhold, a small proportion of their wages weekly or monthly to go into an endowment or benefit fund, even when the company itself contributes as much or more, was instituted with sanguine hopes some forty years ago, first in the great Calumet & Hecla Copper Company, and then in some of the larger railroads; and was on the point of meeting general acceptance when it evoked the hostility of organized labor, which secured legislation in Ohio and other States making it a crime, or at least unlawful, for either side to make a contract whereby any part of the wages was taken or withheld for such purposes. The German theory of old-age pensions is based upon this principle; but it is so unpopular in America that frequently in the South, when things are done for the workmen, they are hardly permitted to know it; a pretence, at least, is made that their own contributions are the entire support of the hospital, library, reading-room, or whatever it may be, when, in fact, the lion's share is borne by the company. There is no doubt that the American laborer resents being done good to, except by himself; and is organized to resent any system of beneficence to the point of making it actually prohibited by the law.

Much of the legislation described in this chapter is wise, and probably all of it is wise in intention. Yet, in closing, one cannot resist calling attention to the unforeseen dangers that always attend legislation running counter to the broad general basis of Anglo-Saxon civilization. One need make no fetich of freedom of contract to believe that laws aimed against it may hit us in unexpected ways. For one famous example, the cash weekly-payment law in Illinois existed in 1893. In that year there was a great panic. Nobody could obtain any money; mills and shops were closing down, par-

ticularly in Chicago. Everybody was being thrown out of employment, and distress to the point of starvation ensued. In the very worst days of that panic some of the largest and most charitable employers of labor met their employees in a monster mass meeting, and reported that while they could not pay in full and nothing apparently was in prospect but an actual shutdown, they had succeeded in getting enough cash to keep all their employees, provided they would take weekly half what was owing to them in money, and the short-time notes or obligations of the firms, or even of banks, for the remainder. The offer evoked the greatest enthusiasm, was unanimously accepted by the thousands of employees, and amid great rejoicing the meeting adjourned;—only to find by the advice of their counsel next morning that under the laws of the State of Illinois such a settlement was made a crime, and that for every workman who received his wages each week only half in cash, the employer would be liable to a one-hundred-dollar fine, and thirty days' imprisonment.

The great reform, not of legislation but of condition, in the labor question, is unquestionably to arrive at a status of *contract*. Hitherto the principle that seems to have been accepted by organized labor, at least in America, is that of being organized for purposes of offence, not for defence; like a mob or rabble which can attack united, but retreats each for himself; which demands, but cannot give; which, like a naughty child or person *non compos*, is not responsible for its own actions. Still there is, as yet, no legislation aimed at or permitting a definite contract in ordinary industrial employment; although there are a few laws which provide that when the employee may not leave without notice, the employer may not discharge him without a corresponding notice except for cause.

As relating mainly to strikes or concerted action, the question of arbitration and conciliation laws will be left for the next chapter; but we may close our discussion of individual legislation by calling attention to the striking attempt to

revive mediæval principles of compulsory labor in certain avocations and in certain portions of this country. The cardinal rule that the contract of labor may not be compelled to be carried out, that an injunction will not issue to perform a labor contract, or even in ordinary cases against breaking it, is, of course, violated by any such legislation; but ingenious attempts have been made to get around it in the Southern States.

This world-wide problem is really rather a racial problem than an economic one amongst Anglo-Saxons. The inability of the African and the Caucasian to live side by side on an equality largely results from this economic question which, broadly stated, is that the Caucasian is willing to work beyond his immediate need voluntarily and without physical compulsion; the African in his natural state is not. The American Indian had the same prejudice against manual labor; but rather that, as a gentleman, he thought himself above it; and his character was such that he always successfully resisted any attempts at enslavement or even compulsory service. The negro, on the other hand, is not above such work, but merely is lazy and needs the impulse of actual hunger or the orders of an overseer. We are, of course, speaking of the mass of the people, in their natural state, before any enlightenment gained by contact with more civilized races. The whole question is discussed on its broadest lines by Mr. Meredith Townsend in his luminous work, "Asia and Europe." He seems hopelessly to conclude that there is no possibility of white and black permanently living together as part of one industrial civilization unless the latter race is definitely under the orders of the former. Without assenting to this view it may be admitted that it is one which has very largely prevailed in the Southern States, and the difficulty there is, of course, with agricultural labor. So fast as the negro can be made a peasant proprietor, the question seems to be in a measure solved; but it is alleged to be almost impossible to get the necessary labor from negroes

when done for others, under contract or otherwise. There is, therefore, a mass of recent legislation in the Southern States which we may entitle the *peonage* laws, which range from the highly objectionable and unconstitutional statute compelling a person to carry out his contract of labor under penalty as for a misdemeanor, to the more ingenious statutes which get at the same result by the indirect means of declaring a person guilty of breaking a contract under which he has acquired money or supplies punishable as for fraud. There are also statutes applying and very greatly extending the old common-law doctrine of loss of service; making it highly criminal for a neighbor to incite a servant or employee to break his contract or even to accept the work of a laborer without ascertaining that he has not broken such contract, as, for instance, by a certificate of discharge from his last master. These laws, it will be seen, differ in no particular from the early labor laws in England, which we carefully summarized for this purpose; except, indeed, that they do stop short of the old English legislation which provided that when a laborer broke his contract or refused to work he could be committed before the nearest magistrate and summarily punished. Even this result, however, has been arrived at by the more circuitous and ingenious legislation of Southern States such as in Georgia, cited in the charge to the Grand Jury.[1] The principle of this elaborate machinery is always that money advances, or supplies, or a lease of a farm for a season or more, or the loan of a mule, having first been made under written contract to the negro, the breaking of such contract or the omission to repay such advances, is declared to be in the nature of fraud; the entering into such contract with intention to break it is declared to be a misdemeanor, etc., etc. The negro refusing to carry out his

[1] Jaremillo *v.* Parsons, 1 N. M. 190; *in re* Lewis, 114 Fed. 963; Peonage cases, 123 Fed. 671; United States *v.* McClellan, 127 Fed. 971; United States *v.* Eberhard, 127 Fed. 971; Peonage cases, 136 Fed. 707; charge to jury, 138 Fed. 686; Robertson *v.* Baldwin, 165 U. S. 275; Clyatt *v.* United States, 197 U. S. 207; Vance *v.* State, 57 S. E. 889; Bailey *v.* Alabama, 211 U. S. 452; Torrey *v.* Alabama, 37 So. 332.

labor contract is then cited before the nearest magistrate, who imposes under the statute a nominal fine. The negro, being of course unable to pay this fine, is remanded to the custody of his bondsmen, who pay it for him, one of them of course being the master. The negro leaves the court in custody of his employer and carries away the impression with him that he has escaped jail only by being committed by the court to his employer to do his employer's work, an impression possibly not too remote from the fact. It is easy to see how to the African mind the magistrate may appear like an Oriental cadi, and how he may be led to carry out his work as submissively as would the Oriental under similar circumstances.

There can be no question, except in the minds of those utterly unfamiliar with the tropics and Southern conditions generally, of the difficulty of this labor problem throughout the world. It has appeared not only in our Southern States but in the West Indies and South Africa—in any country where colored labor is employed. The writer knows of at least one large plantation in the South where many hundred negroes were employed to get in the cotton crops, and the employer was careful never to deliver their letters until the season had terminated; for on the merest invitation to attend a ball or a wedding in some neighboring county, the bulk of the help would leave for that purpose and might or might not return. Railway labor is not so difficult, because the workmen commonly work in gangs under an overseer who usually assumes, if he is not vested with, some physical authority; but the case of the individual farmer who is trusted upon his own exertions to till a field or get in the crop seems to be almost impossible of regulation under a strict English common-law system. Farming on shares appears to be almost equally unsatisfactory. The farmer gets his subsistence, but the share of the proprietor in the crop produced is almost inappreciable.

In closing this chapter reference should be made to a large amount of American legislation, most of which was

absolutely unnecessary as merely embodying the common law. Still it has its use in extending the definition of the "unlawful act." It will be remembered that one of the three branches of conspiracy was the combination to effect a lawful end by unlawful acts. Now many of the States have statutes declaring even threats, or intimidation without physical violence, to be such unlawful act. It may possibly be doubted whether it might not have been so held at the common law; but such legislation has always the advantage of getting a uniform line of decisions from all the judges. The New York statute passed many years ago may serve as a sample: It provides in substance that any threat or intimidation or abusive epithets or the hiding of tools or clothes, when done even by one individual, is an unlawful act; therefore when strikers, although engaged in a lawful strike, as to raise their own wages, or any one of them, intend or do any such act, they become guilty of unlawful conspiracy.

This is probably the only legislation on such matters which adds anything to the common law. Many of the States, usually Western States—apt to be more forgetful of the common law than the older Commonwealths—have been at pains to pass statutes against blacklists. Such statutes are entirely unnecessary, but as they relate to combinations they will be considered in the next chapter.

From the official report of the U. S. government, prepared by the Commission of Labor in 1907, it appears that twenty States and Territories, including Porto Rico, have provisions against intimidation, of which the best example is the New York statute quoted above. Alabama and Colorado have express statutes against picketing, other than the general statutes against interference with employment. Nineteen other States, of which, however, only a few—Massachusetts, Michigan, Oregon, Texas, and Utah—are the same, have provisions against the coercion of employees in trading or industry, usually to prevent them from joining unions, but such statutes are also levelled against the compelling them to

buy or trade in any shop, or to rent or board at any house. Five States have statutes prohibiting the hiring of armed guards other than the regular police, and especially the importing such from other States, Massachusetts and Illinois among the number, though none of the five are so radical as the later statute of Oklahoma quoted below. Statutes for the enforcement of the labor contract exist usually only in the South, but we find a beginning of similar legislation in the North, both Michigan and Minnesota having statutes making it a misdemeanor to enter into a labor contract without intent to perform it in cases where advances are made by way of transportation, supplies, or other benefits. The new anti-tip statute or law forbidding commissions to any servant or employee is to be found in Michigan, Wisconsin, and other States (see page 155 above). A few States require any employer to give a discharged employee a written statement of the reason for his discharge, but such statutes are probably unconstitutional. Colorado has the extraordinary statute forbidding employees to be discharged by reason of age. The common law of loss of service is strengthened generally in the Southern States by statutes against the enticing of employees. Public employment offices, as well as State labor bureaus, are now maintained in nearly all the States.

Examinations and licenses are now required in the several States of electricians, engineers, horse-shoers, mining foremen, elevator operators, plumbers, railroad employees, stationary firemen and engineers, and street railway employees, in addition to the trades enumerated on page 147.

All the Northeastern States except Maine and Vermont, and Maryland, Delaware, West Virginia Alabama, Missouri, Tennessee, Wisconsin, Michigan, Illinois, Indiana, South Dakota, and Washington have general factory acts, and all the mining States have elaborate statutes for the safety of mines.

New York and Wisconsin have statutes forbidding or making illegal labor unions which exclude their members from serving in the militia.

Connecticut and Massachusetts have laws to facilitate profit-sharing by corporations. Such statutes would seem hardly necessary, as profits may be shared or stock distributed or sold without a law to that effect; if it be regarded as part of the reward of wages, no injunction would be granted to protesting stockholders. Fifteen States and Territories, including Porto Rico, have laws for the protection of employees as members of labor unions, and five as members of the national guard or militia, similar to the New York statute just mentioned. Nearly all the States have laws for the protection of employees as voters, as by requiring half holidays or reasonable time to vote, or that their pay should not be given them in envelopes upon which is printed any request to vote or other political material.

Nearly all the States require seats for female employees, and New Jersey requires seats for horse-car drivers. Five States have general provisions regulating the employment of women; ten forbid their employment in bar-rooms (see page 226 above); three regulate their hours of labor to an inequality with men; and most of the States forbid females to be employed in mines or underground generally, or, as we have noted above, in night labor. California, Illinois, and Washington provide that sex shall be no disqualification for employment. Four States, among them Illinois, require employers seeking labor by advertisement to mention (if such be the case) that there is a strike in their establishment; twelve States (see above, page 231) have so far tackled the sweat-shop problem, while practically every State in the Union makes wages a preferred claim in cases of death or insolvency of the employer.

There is, however, one matter we have reserved for the last, because it is one of the two or three points about which the immediate contest before us is to rage. That is the case of individual discharge. It is elementary that just as an employee may leave with cause or without cause, so an employer may discharge without cause or with cause, nor

is he bound to state his reasons, and certain statutes requiring him to do so with the object of avoiding a blacklist have been declared unconstitutional in Southern States. But organized labor is naturally very desirous of resenting the discharge of anybody for no other reason than that of being a union man. In fact it is not too much to say that this, with the legalization of the boycott, are the two great demands the unions are now making upon society. Therefore, statutes have been passed in many States making it unlawful for the employer to make it a condition of employment that the employee should not be a member of a union; or to discharge a person for the reason that he is a member of a union. And closely connected with this is the combination of union employees to force an employer to discharge a man because he is not a member of a union. This last will come logically under the next chapter covering combinations and is not yet the subject of any statute. Now the difficulty of these statutes, about the discharge of union labor, is that it is almost impossible to go into the motive; a man is discharged "for the good of the service." It is easy, of course, to provide that there should be no written or definite contract on the matter; but it is not easy to punish or prohibit the discharge itself without such contract. Such legislation has, however, been universally held unconstitutional, so that at present this must be the final word on the subject. The right of the employer to employ whom he likes and to discharge whom he likes and make a preference, if he choose, either for union or non-union labor, is one which cannot be taken away from him by legislation, according to decisions of the Supreme Courts of Missouri, New York, and the United States. Therefore, as the matter at present stands, the constitutions, State and Federal, must be amended if that cardinal right of trade and labor is to be interfered with.

In closing it may be wise to run over the actual labor laws passed in the States during the last twenty years, mentioning

the more important lines of legislation so as to show the general tendency.

Beginning in 1890 we find most of the statutes concern the counterfeiting of union labels, arbitration laws, hours of labor in State employments, weekly payment laws, the preference of debts for labor in cases of insolvency, the prohibition of railroad relief funds, the hours of women and children in factories, seats for women in shops, the restriction of prison labor, dangerous machinery in factories, protection in mines, and the incorporation of trades-unions. Mechanics' lien laws are passed in large quantities every year and are the subject of endless amendment. We will, therefore, leave this out for the rest of our discussion as after all affecting only the owners of real estate.

In 1891 we find more laws regulating or limiting the hours of labor of women and children, prohibiting it entirely in mines; several anti-truck laws; two laws against the screening of coal before the miner is paid, and in Massachusetts, laws against imposing fines for imperfect weaving and deducting the fine from the wages paid. Pennsylvania thinks it necessary to enact by statute that a strike is lawful when the wages are insufficient or it is contrary to union rules to work, which latter part is clearly unconstitutional. There is one statute against boycotting and three against blacklisting.

In 1892 there are more laws limiting the hours of labor of women and children to fifty-eight, or in New Jersey, fifty-five, hours a week; laws against weavers' fines, and restricting the continuous hours of railway men. The sweat-shop acts first appear in this year, and the statutes forbidding the discharge of men for belonging to a union or making a condition of their employment that they do not belong to one.

In 1893 the laws establishing State bureaus of labor become numerous. Four more States adopt sweat-shop laws, and there is further regulation of child labor. Six States adopt statutes against blacklisting.

In 1894, being the year after the panic, labor legislation is largely arrested. New York adopts the statute, afterward held constitutional, requiring that only citizens of the United States should be employed on public works, and statutes begin to appear to provide for the unemployed. There is legislation also against intimidation by unions, against blacklisting, and against convict-made goods.

In 1895 there is still less legislation; only a statute for State arbitration, against payment of wages in store orders, against discrimination against unions, and for factory legislation may be noted.

In 1896 there are a few statutes for State arbitration and weekly payment, for regulating the doctrine of fellow servants, and some legislation concerning factories and sweatshops.

In 1897 California provides a minimum wage of two dollars on public contracts, and Kansas adopts the first statute against what are termed indirect contempts; that is, requiring trial by jury for contempts not committed in the presence of the court. There is a little legislation against blacklisting, and Southern States forbid the farming out of convict labor.

In 1898 Virginia copies the Kansas statute against indirect contempts, and one or two States require convict-made goods manufactured outside the State to be so labelled, which statutes have since been held unconstitutional as an interference with interstate commerce.

In 1899 the question of discrimination against union labor becomes still more prominent and it is in some States made a misdemeanor to make the belonging or not belonging to a union a condition of employment. All these statutes have since been held unconstitutional.

In 1900, a year of great prosperity, there is almost no labor legislation.

In 1901 we only find laws establishing free employment bureaus, except that California provides a maximum time

for women and children of nine hours a day in both manufacturing and mercantile occupations, and a minimum wage upon all public work of twenty cents an hour.

In 1902 Colorado overrules her Supreme Court by getting by constitutional amendment an eight-hour day in mines. Massachusetts passes a joint resolution of the Legislature asking for a Federal constitutional amendment which shall permit Congress to fix uniform hours of labor throughout the United States, and Kentucky and other Southern States begin to legislate to control the hours of labor of women and children.

In 1903 this movement continues and in the Northwestern States, Oregon and Colorado, the length of hours of labor of women of all ages is generally limited. Weekly payments and anti-truck laws are adopted. Montana forbids company boarding-houses and Colorado makes the striking attempt to do away with the so-called dead line; that is to say, a statute forbidding any person to be discharged by reason of age, between the years of eighteen and sixty. California follows Maryland in abolishing the conspiracy law, both as applied to employers and employees.[1] It does not seem that in either State this statute has yet been tested as class legislation. Legislation against the open shop continues in far Western States, while Minnesota makes it a misdemeanor for an employer to exact as a condition of employment that the employee shall not take part in a strike.

In 1904 there is little legislation. Far Western States go on with the protection of child labor, particularly in mines, and Alabama adopts a general statute against picketing, boycotting, and blacklisting.

In 1905 we first find legislation against peonage or compulsory labor in the Southern States, North Carolina and Alabama. The celebrated constitutional amendment of New York is enacted, which gives the Legislature full power to regulate wages, hours, and conditions in public labor. (See

[1] See the next chapter.

above, p. 161.) Further regulation of factories and mines goes on, with State employment agencies and reform of the employers' liability laws. Colorado and Utah prohibit boycotts and blacklisting, and in one or two States corporations are required to give every person discharged a letter stating the reason of his discharge, which statute was since held unconstitutional in Georgia.

In 1906 the usual sanitary legislation goes on. Massachusetts adopts an eight-hour law for public work. Arkansas and Louisiana attempt legislation preventing the violation of contract by persons farming on shares, or the hiring of farm laborers by others, and Massachusetts establishes free employment bureaus.

In 1907 four more Southern States attempt laws to control agricultural labor; the factory acts and child-labor laws continue to spread through the South; New York largely develops its line of sweat-shop legislation, and more child-labor laws and laws prohibiting the work of women in mines are introduced in the South.

In 1908 Oklahoma adopts the Kansas contempt statute, and Virginia provides for appeals to the Supreme Court in contempt cases. South Carolina makes it a misdemeanor to fail to work after being employed on a contract for personal services, or for the employer on his side to fail to carry it out. Oklahoma adopts a curious strike statute which, besides the usual provision for the closed shop, makes it a felony to bring workmen, *i. e.*, strike-breakers, from other places in the State or from other States under false pretences, including, in the latter, concealment of the existence of the strike; and makes it a felony to hire armed men to guard such persons.

With this climax of labor legislation our review may properly end, but the reader will not fail to note the advantage that may be derived from experience of these extraordinary statutes as they are tried out in the different States and Territories. It could be wished that some machinery could be

provided for obtaining information as to their practical working. The legislation of 1909 was principally concerned with the matter of employers' liability for accidents, a conference upon this subject having been held by three State commissions, New York, Minnesota, and Wisconsin. Massachusetts extended the act of 1908 permitting employers and employees to contract for the compensation of accidents; and Montana established a State accident insurance for coal-miners. California and Montana exempted labor in a large degree from the operation of the State anti-trust laws; but Washington adopted a new statute defining a conspiracy to exist when two or more persons interfere or threaten to interfere with the trade, tools, or property of another, and proof of an overt act is not necessary. North and South Carolina, Texas, and Connecticut passed the usual statute protecting employees from being discharged because of membership in a trades-union, which, as we have said, has been held unconstitutional wherever contested. Arizona, California, Idaho, Washington, Wyoming and Nevada enacted or amended eight-hour measures for employees in mines, but little was accomplished for children in the Southern States.[1]

The labor-injunction question has been recently covered by an admirable study prepared by the Massachusetts Bureau of Statistics and published in December, 1909. The investigation covers eleven years, from 1898 to 1908, in which there occurred two thousand and two strikes. In sixty-six of these strikes the employers sought injunctions and in forty-six cases injunctions were actually issued. In only nine cases were there proceedings for contempt of these injunctions, while only in two cases out of the two thousand were there any convictions for contempt of court. In eighteen cases injunctions were sought to prevent employees from striking, but only in four of these were they granted,

[1] See "Progressive Tendencies in the Labor Legislation of 1909," by Irene Osgood, in the *American Political Science Review* for May, 1910.

and one of these was later dissolved. Seven bills were brought by employees against unions for interference with their employment, etc., and in three cases unions sought injunctions against other unions. In one case a union brought a bill against an employer and in one case an employer sought an injunction against an employers' association. Under a decision of the Massachusetts Supreme Court it was declared unlawful for a trade-union to impose fines upon those of its members who refused to obey its orders to strike or engage in a boycott. In 1909 a bill was introduced in the Legislature with the special object of permitting this, but it failed of passage. The *Bulletin* contains a brief history of equity jurisdiction in labor cases and reprints all the decisions of the Supreme Court of Massachusetts down to the year 1909, and the actual injunctions issued by Superior Courts in five late cases, with a chronological summary of proceedings in cases concerning industrial disputes in all Massachusetts courts for the eleven years covered by the report.

The matter of labor legislation is of such world-wide importance that a word or two may not be out of place concerning recent legislation in other countries. Other than factory and sweat-shop acts and hours of labor laws, there are three great lines of modern legislation in Europe, North America, and Australasia: employers' liability, old-age pensions, minimum wage. On the first point, the tendency of modern legislation, as has been intimated, is to make the employer liable in all cases for personal injuries suffered in his employ without regard to contributory negligence or the cause of the accident. That is, it is in the nature of an insurance which the employer is made to carry as part of his business expenses. It has the great advantage of doing away with litigation and confining his liability to reasonable amounts, and in the writer's opinion is in the long run for the benefit of the employer himself. There is one exception.

The employer is not liable when the injury was caused by the wilful misconduct of the workman injured.

Old-age pensions, or State insurance against old age as well as disability, now exist in several countries, notably Germany, New Zealand, and England. The German law[1] is much the most intelligent and the least communistic in that it provides that half the fund is raised by deductions made from the wages of the workmen themselves. It applies to all persons, male and female, employed under salary or wages as workmen, journeymen, apprentices, or servants; also to all industrial workmen, skilled laborers, clerks, porters, and assistants; also to all other persons whose occupation consists principally in the service of others, such as teachers who do not receive an annual salary of more than five hundred dollars; also to sailors and railway employees; also to domestic servants. No one is obliged to insure himself who is over the age of seventy, and no one is bound to insure who does not work in a required insurance class for more than twelve weeks or fifty days in each year. When women get married, they insist on reimbursement of one half of all the insurance assessments they have paid up to that time, provided such assessments amount to two hundred weeks, or four years—a provision which must very much help out marriages, and from which the amusing deduction may be drawn that the average value of a husband in Germany is considered to be about one-half the expense of supporting his wife for a period of two hundred weeks, or four years. On the other hand, the law has the effect of postponing marriage for the first four years of a woman's employment, as it practically imposes a penalty upon a woman marrying before four years from the time when she begins to pay to the State insurance money.

The English old-age pension law is a mere gratuity in the nature of outdoor relief, giving to everybody who has reached a certain age, without reference to any previous service,

[1] U. S. Industrial Commission Reports, vol. V, pp. 228–241.

tramps or drones as well as workmen. It is a law indefensible in principle and merely the accident of a radical government. It provides that every person over seventy whose yearly means do not exceed thirty-one pounds ten shillings (*i. e.* income from property or privilege) and is not in "regular receipt of poor relief" and has not "habitually failed to work according to his ability, opportunity and need" nor been sentenced to any imprisonment for a criminal offence—all to be determined by a local pension committee with appeal to the central pension authority—shall receive a pension of five shillings a week when his annual means do not exceed twenty-one pounds, that is, thirteen pounds a year, down to one shilling a week when they exceed twenty-eight pounds seventeen shillings six pence.

The New Zealand law is more intelligent. It extends old-age pensions to every person over the age of sixty-five who has resided thirty-five years in the colony and not been imprisoned for a criminal offence, nor has abandoned his wife, nor neglected to provide for his or her children. It does not, however, appear that any previous employment is necessary. The pension amounts to eighteen pounds, say ninety dollars, a year and is not given to any one who has an income of fifty-two pounds a year. The machinery of the law is largely conducted through the post-office and the entire expense is met by the state. That is to say, there is no contribution from the laborers themselves.

Austria, Italy, Norway, and Denmark in 1901 had also state insurance systems.

The minimum-wage idea has so far been attempted only in New Zealand and in Great Britain.[1] (See above, p. 160.)

[1] This, the Trade Boards Act, the 22d chapter of the ninth of Edward VII., enacted October 20, 1909, took effect January 1, 1910. The act applies without specification to ready-made and wholesale tailoring, the making of boxes, machine-made lace and chain-making, and may be applied to other trades by provisional order of the Board of Trade, when confirmed by Parliament. The Board of Trade may make such provisional order applying the act to any specified trade if they are satisfied that the rate of wages prevailing in that trade is exceptionally low as compared with that in other employments, and that the other circumstances of the trade are such as to

The New Zealand law of 1899 provided a minimum wage of four shillings per week for boys and girls, and five shillings for boys under eighteen, but the principle has been much extended by a more recent statute. The English law is not yet in active operation, and may or may not receive great extension. It provides in substance for the fixing of a minimum wage in the clothing trade or *any other* trade specified by the Home Secretary. The obvious probability is that it will, as in New Zealand, soon be extended to all trades. This wage is to be fixed by a board of arbitrators with the usual representation given to each side, and it will doubtless work, as it does in New Zealand, for the elevation of wages, as such commissions rarely reduce them.

Co-operation and profit-sharing, the great hope of the middle years of the nineteenth century, has made little progress in England or the United States since. Such successful experiments as now exist consist principally in offering to the employees the opportunity to buy the stock of the company at a reasonable rate, as in the case of the Illinois Central Railroad and the United States Steel Company. Many mills, however, give a certain increase in wages at the end of regular periods proportionate to the profits. This technically is what we call profit-sharing. The word "co-operation" should be reserved for institutions actually co-operative; that is to say, where the employees are partners in business

render the application of the act expedient; and in like manner they may make a provisional order providing that the act shall cease to apply to any trade to which it already was applied. Section 2 provides that the Board of Trade shall establish one or more trade boards for any trade to which the act is to be applied, with separate trade boards for Ireland. These trade boards (section 11) consist of members representing employers and members representing workers in equal proportions, and of certain appointed members. Women are eligible, and the representative members may be elected or nominated as the regulations determine. The chairman and secretary are appointed by the Board of Trade. Such boards are given power to fix minimum rates of wages both for time and piece work, which thereafter must be observed under penalty. There is further a machinery for the establishment of district trade committees. All regulations made by such Boards of Trade shall be laid as soon as possible before both houses of Parliament; but there does not appear to be any other appeal.

with the employers. Of such there are very few in the United States, although there are quite a number in England. In 1901 there were only nineteen co-operative establishments in the United States, most prominent among which are the Peacedale Woolen Mills in Rhode Island; the Riverside Press in Cambridge; Rand, McNally & Co., Chicago; the Century Company, of New York; the Proctor & Gamble Soap Co., of Cincinnati; the Bourne Mills, of Fall River, and the Pillsbury Flour Mills, of Minneapolis. Yet these institutions are really profit-sharing rather than co-operative, for the return is merely an extra cash dividend to employees who have no voice in the management. Mr. Gilman in his book, "A Dividend to Labor," tells us that there are thirty-nine other cases at least where profit-sharing once adopted has been abandoned. On the other hand, in Great Britain there were in 1899 one hundred and ten important co-operative productive establishments. There are many more on the Continent.

Arbitration laws are also far more developed and successful in European and Australasian countries than in Great Britain or the United States, although the first English act concerning arbitration was passed as early as 1603. In the first year of Queen Anne, 1701, was the first act referring specially to arbitration of labor, and the next, Lord St. Leonard's act, in 1867, which attempted to establish councils of conciliation, something after the pattern of the French *conseils de prudhommes;* but in 1896 these acts were repealed and the Conciliation Act of the 59th Victoria, chapter 30, substituted. It provides that the boards of arbitration may act of their own motion in so far as to make inquiry and take such steps as they deem expedient to bring the parties together, and upon application of either side may appoint a conciliator, and on the application of both sides, appoint an arbitrator. Their award is filed of record and made public, but no provision is made for its compulsory enforcement. In France, the legislation is much more intelligent. There

the distinction between individual and collective labor is clearly made and within recent years there is elaborate legislation for the settlement of strikes, disputes of the collective class, which we will later describe. For the adjustment of individual disputes, France has long had in her *conseils de prudhommes* a special system of labor courts that constitutes one of her most distinctive social institutions.[1] These are special tribunals composed of employers and workingmen, created for the purpose of adjusting disputes by conciliation if possible, or judicially if conciliation fails. Appeal from their decisions is made to the tribunals of commerce. The first such council was created in Lyons in 1806, but since they have spread through all France. When the amount involved does not exceed two hundred francs, the judgment of the council is final; above that sum an appeal may be made to the tribunal of commerce. The most important element of all, perhaps, is that these councils have to some extent criminal powers, or powers of punishment. They can examine the acts of workingmen in the industries under their jurisdiction tending to disturb order or discipline, and impose penalties of imprisonment not exceeding three days, having for this concurrent jurisdiction with the justices of the peace. Elaborate arbitration laws also exist in France, and whenever any strike occurs, if the parties do not invoke arbitration the justices of the peace must intervene to conciliate. Still there is no compulsory arbitration except by agreement of both sides.

Similar laws exist in Belgium, Switzerland, Germany, Austria, Holland, New Zealand, Australia, and Canada.

The apprentice system still exists in perfection in all European states, including Great Britain, although there most of the unions restrict the number that may be employed. In the United States it has, unfortunately, fallen entirely into disuse.

[1] See the author's Report to the U. S. Industrial Commission, vol. XVI, page 173.

It has already been mentioned that the factory laws, laws regulating the sanitary conditions, etc., of factories and sweat-shops, are far more complicated and intelligent upon the Continent, and even in England, than in the United States of America.

Coming finally to what most persons consider the most important line, that of strikes, boycotts, and intimidation, the legislation of the Continent of Europe where common-law principles of individual liberty do not interfere, is, of course, far more complex and far more effective than that of either England or the United States. The principle of combination we leave for the next chapter. In European legislation, where we are met with no constitutional difficulties, we shall expect to find a more paternalistic control by the state, although in France the decree of March 2, 1791, provided that every person "shall be free to engage in such an enterprise or exercise, such profession, art or trade, as he may desire." In Germany an elaborate attempt has been recently made to re-introduce the old guild system made over from its mediæval form to suit modern conditions, and in other countries where the government does not interfere, the trade guilds, or unions, present insuperable obstacles to any one engaging in their industry who is not a member of the guild or has not gone through the required apprenticeship.[1]

The French decree of 1791 freeing labor took effect also in French Switzerland. A most interesting account of the experiment of the Swiss Cantons on freedom of labor and the guild system will be found in the U. S. Industrial Commission Report above referred to.[2] Germany differs from England and France in that the old guild system was never absolutely done away with; in 1807 serfdom was abolished in Prussia, and a decree of December, 1808, apparently under the influence of Napoleon, proclaimed the right of citizens freely to engage in such occupations as they desired. Exclusive privileges and industrial monopolies were abol-

[1] U. S. Industrial Commission Reports, vol. XVI, p. 9. [2] *Ibid.*, p. 10.

ished by subsequent decrees, and the general movement for the freeing of industry was consummated in 1845 by the labor code of that year, which, by the labor code of 1883, extends over all Germany: "The practice of any trade is made free to all. . . . The distinctions between town and country in relation to the practice of any handicraft trade is abolished. . . . Trade and merchant guilds have no right to exclude others from the practice of any trade. . . . The right to the independent exercise of a trade shall in no way depend upon the sex. . . ." [1]

It will be seen that the more enlightened European countries arrived, under the influence of Napoleon probably, or the French Revolution, in the early part of the last century, to the point of specifically adopting the English common law of liberty of labor and trade which "organized labor" seems already desirous of departing from; but the German Civil Code goes on to say (Section 611): "By the contract of hiring of services the person who promises service is obliged to render the promised service, and the other party is obliged to the payment of the salary or wage agreed upon. All nature of services may be the subject of the service contract." It would seem, therefore, that the contract may be specifically enforced. So, in France, by the law of 1890, "A person can only bind himself to give his services for a certain time or a special enterprise. The hiring of services made without a fixed duration can always cease at the wish of one of the contracting parties. Nevertheless, the cancellation of the contract at the wish of one only of the contracting parties may give rise to damages." It would appear, therefore, that definite contracts may be specifically enforced. Austria has somewhat similar laws, although a larger proportion of industrial employment is subject to state regulation, and here no employer can employ any workingman without a book or passbook, which serves both as identification and record. Generally in Europe the use of a written contract

[1] *Ibid.*, pp. 11 and 12.

in labor engagements is far more usual than with us. This, perhaps, makes it easier to enforce such contracts specifically. Nevertheless, I find no specific statute on the subject. Indeed, the Code Napoleon adopts the English law and provides[1] that "every obligation to do or not to do resolves itself into damages in the case of non-performance," while the modern English law act of 1875 provides a special and summary remedy in the county courts for labor disputes whereby when the contract is not rescinded the court may award damages or take security for the performance of the labor contract itself. This, however, does not include domestic servants. Both France and Belgium copy the common law as to slavery, requiring contracts to be for a certain time or a determined work. In Russia, however, contracts may be made for five years.

It is still true that no European country outside of Turkey has yet fixed by law the amount of wages in private employments or the minimum amount, though that result is effected by the machinery of arbitration in Great Britain and New Zealand. Continental countries, however, universally legislate as to hours of labor even of adult women, there being no constitutional principle protecting their personal liberty in that particular, although in Belgium and Great Britain the laws do not, as a rule, apply to adult male labor. The hours are generally eleven or twelve, instead of eight or nine as in England or the United States. There is elaborate special regulation of times and conditions in labor in railways, laundries, bakeries, etc. The English law generally divides persons, according to their age, into three classes, adults, young persons (from fourteen to eighteen), or children, and the system is most elaborate. Generally no children under the age of eleven may be employed at all.

Sanitary and social regulations are far more intelligent than ours. Generally, the employment of women in factories within four weeks after childbirth is forbidden; and in

[1] *Ibid.*, p. 64.

Switzerland it is forbidden to employ pregnant women in certain occupations dangerous to the health of posterity. The German Civil Code declares that "A married woman has both the right and the obligation of keeping house. She is obliged to attend to all domestic labor and the affairs of her husband in so far as such labor or occupation is usual according to her social condition. She is supreme within her sphere, or at least has power to act or bind her husband in domestic matters, and he cannot limit her powers without a divorce. He may, however, annul any contract made by her for her personal labor with a third party." [1]

The anti-truck and weekly-payment laws exist in all countries. Europe generally, particularly Great Britain and the Roman Catholic countries, are handicapped by an infinity of holidays. In Roman Catholic countries they are generally single days, saints' days, etc., scattered throughout the year, but in Great Britain no skilled laborer will work at all for some weeks at a time.

The English law against intimidation is the model of the New York statute and most others. It defines in great detail what intimidation is—substantially, that it is violence or threats, the persistently following, the hiding of tools, etc , or the watching or besetting the house or place of business—and menaces, as well as actual violence, are recognized as unlawful and punishable by imprisonment, in Germany, Italy, Sweden, and other countries. Germany and Austria copy the English common law as to enticing from service.

There is as yet, however, no evidence in Europe outside of Great Britain of the American tendency to make a special privileged class of skilled or industrial labor. So far as appears, there is no special legislation in any European country which is concerned particularly with the legal or political rights of industrial laborers.[2] There is much more co-operation and sympathy between employers and employees, at least in Continental countries, and possibly for

[1] *Ibid.*, p. 53.

[2] *Ibid.*, p. 77.

this reason co-operation has proved far more successful.[1] State labor bureaus, state insurance, saving banks, and employment agencies are almost universal throughout the Continent.

[1] See Gilman's "A Dividend to Labor," Boston, 1899. Jones's "Cooperative Production," Oxford, 1894.

CHAPTER XII

COMBINATIONS IN LABOR MATTERS

We have now gone over the history of modern legislation in the two great fields of property and personal liberty, and we have generally found that the same principles of jurisprudence govern both. So shall we now find when we come to combinations that there is no difference or distinction in the law between combinations of capital and combinations of individual faculties. In both fields a "combine" is obnoxious, as the untutored mind instinctively feels. Combinations may, of course, be lawful; but the fact that no actually criminal purpose or act can be found against them is not conclusive of their legality. At the risk of wearying the reader I would reiterate my belief that this was one of the greatest juristic achievements of the English common law; and that the question whether it shall be all done away with or retained is the most momentous public question now before us in industrial and social matters.[1] Whether, on the one hand, Standard Oil combinations shall be permitted to the point of universal monopoly of trade and opportunity; or, on the other, close unions built up, even by legislation itself, to an equally impregnable position of monopoly of opportunity, or so as to become a universal privileged guild —are questions to be determined by the same principles; and equally momentous to the future of our republic and of human society as now constituted. And before passing to a review of the legislation itself, I would lay down the princi-

[1] Professor Dicey, I find, in his recent book, "Law and Opinion in England," opens this subject with a statement equally strong (Appendix, note 1, pp. 465–6).

ple which I believe to be the one which will ultimately be found to be the controlling test: that of *intent*. The *effect* (often proposed as the test) is really immaterial as determining the illegality of the combination, except so far as it may be evidence of the probable intention of the participators at its inception.

For the early English conspiracies were by no means necessarily or usually aimed at the commission of some definite crime; they were rather described to be the conspiracies of great lords for the general "oppression" of a weaker neighbor, for which he sought refuge or protection in the court of chancery. Now, general oppression or wrongdoing, the exclusion from land or labor or property or trade, by a powerful combination, is precisely the moral injury suffered in modern boycotts when there is no actual crime committed. Indeed, one of the earliest kinds of conspiracy expressly mentioned and described in the English statutes is a conspiracy for the maintenance of lawsuits, which by the very definition of the thing must be a combination for an end not in itself unlawful. The American courts have been curiously obscure or vacillating on this point. With their too general forgetfulness of historical legislation and the early common law, they have gone from one extreme to the other, often with a trivial consideration of the importance of the points involved, and always with an entire absence of a universal point of view, of that genius which grasps a question in its entirety and is not confused by irrelevant details. It is only of late when the matter has come before the Federal Supreme Court and the courts of a few States which have been educated by a frequent recurrence of disputes of this sort that we begin again to see the principle clearly, as I shall venture to lay it down here: that the acts of a number of persons combined are to be judged by their *intent*. In individual acts the intent is of no importance except as it turns an accident into a crime; chance-medley for instance into murder, or mere asportation into larceny, or ordinary

conversation into slander; yet these few instances serve to show how universal is the recognition of intent in the law and how little difficulty it presents. Juries have very rarely any difficulty in determining this question of intent in individual acts; and in like manner they will have no difficluty when it is recognized as the fundamental test in cases of combination, *i. e.*, conspiracy. And for the antiquity of this our law we need but mention a few cases: Rex *v.* Crispe, cited in the Great Case of Monopolies (7 State Trials 513): "Here was lately an agreement between copperas makers and copperas merchants for the buying of *all* copperas, and that these copperas makers shall for three years make at so much a ton and restraining them from selling to others"—*held* a criminal conspiracy; of the tailors of Ipswich (6 Coke 103) where a company of tailors made a by-law to exclude non-members from exercising their trade; and the Lilleshall case (see p. 71 above).

Thus in matters of *capital:* is the *first* intent, the *immediate* object, to increase profits, to acquire or enjoy property, to enlarge one's business,[1] or is the *first* intention to destroy a competitor or create a monopoly? So in *labor* combinations: is the *first* object to get better terms for the persons combining, an increase of wages or a reduction of hours, improved conditions in factories and shops, etc., etc., or is the *first* thing they are seeking to do to injure a third person, not concerned in the dispute, or to control the liberty and constitutional right of the employer himself? If the latter, it is "oppression" within the meaning of the early common law, and should be so held to-day.

And not only is this great domain of English law noteworthy because it is so subtle as to grasp the effect of a combination other than that of the individual acts, and the intent of that combination other than its effect, but it is perhaps the only great realm of law which really attempts to

[1] What Mr. Cooke calls, in his preface, "the natural incident or outgrowth of some lawful relation." *Combination, Monopolies and Labor Unions*, p. iv.

carry out the principle of the Golden Rule. In all other matters, if an act be lawful, it remains lawful, although done with the intent of injuring another; it does not usually even give rise to an action for damages; but the great principle of the English law of conspiracy was crystallized two hundred years ago in the classic phrase of Hawkins, in his "Pleas of the Crown," vol. II, p. 121: "There is no doubt that a combination made to the prejudice of a third person is highly criminal at the common law." [1] The usual definition of conspiracy, that is, of unlawful combination, is a combination made for an unlawful purpose or for a lawful purpose using unlawful means; this is to be found in all the text-books; but it should be amplified in accordance with our earliest and deepest law so as to include a combination for the mere purpose of injuring another, or molesting him or controlling him in the exercise of his ordinary lawful rights; and *a fortiori*—as of combinations to enhance the price of food—to injure the public. It is for this reason that the combination of many to diminish the trade of one is an unlawful combination; the combination may be punished although all the acts done are within the letter of the law; and when the conspiracy is evidenced by unlawful acts, the conspiracy may be punished far more severely than the acts could have been punished themselves. We have noted that one of the great attempts of organized labor to-day is to do away with this principle, to provide that no combination should be punished when the acts committed are not punishable in themselves, and that in fact it should be the acts and not the combination which is punishable at all. This, it is true, was enacted by the

[1] "The position cited by Chitty from Hawkins, by way of summing up the result of the cases, is this: 'In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character.' And Chitty adds that 'the object of conspiracy is not confined to an immediate wrong to individuals; it may be to injure public trade, to affect public health, to violate public police, to insult public justice, or to do any act in itself illegal (3 Chit. Crim. Law, 1139).'" Quoted by Shaw, Chief Justice of Massachusetts, in Commonwealth *v.* Hunt (4 Metc. Illinois), printed as a Senate Document in the 57th Congress, 1st session (Mass.) 111.

English Conspiracy and Protection of Property Act of 1875, as to industrial disputes only, in England; and it is just as true that it would be unconstitutional in this country, both under the Federal and State constitutions. Yet the agitation for this revolution in the common law has been successful in Maryland, California, and Oklahoma, though, as has been said, it does not appear that any cases have yet been tried where the exception was pleaded in defence, still less where the statute has been sustained as constitutional.

It is to be noted that the original English Act of 1875 only did away with the criminal liability and left the victims of the boycott or blacklist free to sue the combination for damages; but by the "Trade Disputes Act," 6 Edward 7, chapter 47 (December 21, 1906) the following paragraph was added:

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

And also a clause as to picketing:

"It shall be lawful for one *or more*[1] persons, acting on their own behalf or on behalf of a trade-union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working."

And another upon inducing the breaking of contracts, loss of service:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the

[1] The italics are our own.

right of some other person to dispose of his capital or his labor as he wills."

Furthermore, after the Taff Vale case, trades-unions were exempted from all liability:

"(1) An action against a trade-union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade-union in respect of any tortious act alleged to have been committed by or on behalf of the trade-union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade-union to be sued in the events provided for by the Trades-Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

"(3) In this act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labor, of any person, and the expression 'workmen' means all persons employed in trade and industry, whether or not in the employment of the employer with whom a trade dispute arises; and, in section three of the last-mentioned act, the words 'between employers and workmen' shall be repealed."

It is hard to say whether any part of this surprising statute would be constitutional in this country, except the second paragraph (p. 267, above); leaving out even there the words "or more." Certain it is that by it industrial conditions are placed under the sway of the labor unions, and the commerce and prosperity of England now lie in the "hollow of the hand" of those who work with it.

This effort to do away with the law of combinations in labor matters with that aimed at forbidding or controlling the injunction in labor disputes, and with also the statutes

which give a special privilege to union labor, we have found to be among the most important pieces of modern legislation. Alabama and Colorado have statutes legalizing "picketing," but a similar bill in Massachusetts failed repeatedly of enactment. But when we come to the statutes applying to *combinations* solely, and defining them, there have been many statutes declaring blacklisting and boycotts to be unlawful—which is merely the common law—and a few statutes especially forbidding them. Thus, by the year 1907, twenty-two States and the United States had statutes against blacklisting, five had statutes against boycotting, ten had adopted laws regulating strikes in cases of railway employment, Minnesota a law forbidding any employer to require as a condition of employment any statement as to the participation of the applicant in a strike for more than one year immediately preceding, Oklahoma a law requiring him to advise new applicants for employment of any labor dispute then pending with him, and to give such notice in his advertisements; which statute barely failed of enactment in Massachusetts. The best definition of the boycott is, perhaps, to be found in the law of Alabama: "Any two or more persons who conspire together for the purpose of preventing any person, persons, firm, or corporation from carrying on any lawful business, or for the purpose of interfering with the same, shall be guilty of a misdemeanor." The most cumbrous is that of Indiana, which, attempting to express the matter in more detail, is far too long to quote.[1] Many acts which are really part of a boycott, or unlawful, *i. e.*, sympathetic strikes, will be found under the heading "Intimidation" or "Interference with Employment" in other States; such is the recent statute of Washington (see above, p. 251). Unless the function of a statute be to instruct the ignorant, it would probably be better to forego all such definitions and rely upon the elasticity of the common law.

[1] Indiana Revision of 1901, Sec. 3312 M. There is also an elaborate definition of "trusts," "conspiracies," and "boycotts" in chapter 94 of the Laws of Texas, 1903.

As an example of the most advanced labor legislation we may briefly digest the Oklahoma laws of 1907–8:

By the Act of May 29, 1908, two hours must be allowed by every corporation or individual employer to his employees to vote, and it is made a misdemeanor to in any way influence his vote; and there is a general labor code enacted May 22, 1908, which, with its supplements, is perhaps the most radical labor legislation to be found in the United States. After establishing a State commissioner of labor, a board of conciliation and arbitration, and free employment offices, all of which are usual in other States, there is an elaborate chapter on factory regulation and one upon mine regulations, and to protect persons working on buildings, railroads, steam boilers, etc., and a carefully drawn statute regulating the labor of children. Then there are other provisions which are more unusual. The Canadian statute substantially is enacted as to strikes: "whenever there shall exist a strike or lockout where (in the judgment of the State Board of Conciliation) the general public shall appear likely to suffer injury or inconvenience, and neither party consents to an arbitration," then the board, having failed to effect a conciliation, may proceed on its own motion to make investigation and propose a settlement, with recommendations to both parties, and presumably publish the same. It has, of course, no power to enforce a settlement, but may compel testimony, etc. (Article II, section 4.)

Private employment offices are carefully regulated, the fees limited to two dollars, and the money must be returned if no place is found, with careful provisions against sending help to immoral resorts.

The compelling of an agreement, either written or "verbal," [1] not to join a labor union as a condition of obtaining or continuing in employment is made a misdemeanor, punishable with one thousand dollars fine and twelve months imprisonment.

[1] A common vulgarism; the law probably means "oral."

Section 2 of this act (June 6, 1908) copies the *older* English statute of 1875; that is to say, it does away with all *criminal* liability for conspiracies in labor matters, and it further provides that no "such agreement, combination, or contract be construed as in restraint of trade or commerce; nor shall any restraining order or injunction be issued with relation thereto, provided only that nothing in this act shall be construed to authorize force or violence." We have already commented on the possible unconstitutionality of this act.

Section 3 makes it unlawful for anybody to induce or persuade workmen to change from one place to another (except presumably the labor unions themselves), or to bring workmen into the State by means of any false or deceptive representations, false advertising or false pretences, or by reason of the existence of a strike or other "trouble." Failure to state in an advertisement, proposal or contracts for the employment of workmen that there is a strike or other "trouble" is made a criminal offence, punishable with a year's imprisonment or two thousand dollars fine (this is the law which failed of passage in the Massachusetts Legislature of 1910).

The hiring of armed guards, as is usual in the West, is made heavily criminal. Finally, to workmen who have been influenced or persuaded to do anything by anybody except another workman, is given a suit for damages against the person so persuading them. The lot of the employer in Oklahoma is indeed a parlous one!

By the law of April 24, whenever a workman is discharged, his employer must give him a letter stating the reason truly, under penalty of five hundred dollars fine and one year's imprisonment, and such letter must be written, not printed, and the form and appearance of the stationery is carefully provided for and all secret marks forbidden. Oklahoma is one of the eight-hour States, with the minimum average wage in public work, referred to above; and all contracts must be made on that basis. Wages must be paid fort-

nightly in cash by all persons or corporations engaged in mining or manufacturing.

Oklahoma is the test-tube of American legislative reactions. We shall await with interest the legislation of 1911, as well as the effect of the laws we have summarized above. In the meantime Oklahoma has presented to the constitutional lawyer the long-sought problem of whether a sovereign State once admitted to the Union is bound by the Act of Congress authorizing such admission. The enabling act of Oklahoma required that its capital should be fixed at Guthrie and not moved for a period of years. In May, 1910, within such period of limitation, by act of legislature, supplemented by a plebiscitum of the people and the executive action of Governor Haskell, the capital was removed to Oklahoma City, and the State seal conveyed there surreptitiously, in spite of the injunction of a Federal district court. A more beautiful American constitutional question could hardly be presented. It may not at first seem to the reader so important, but when he considers that, for instance, Utah and other Western States have abolished Mormonism in the same manner, or have agreed to give equal treatment to the Japanese and Chinese in the same manner—by an enabling act of Congress, ratified and perpetuated in the State Constitution—he will see the importance of the question. It was anticipated in the writer's work on constitutional law ("Federal and State Constitutions," p. 186, note 8): "The enabling acts admitting the eight new Western States usually provided against polygamy on account of the Mormon influence, and this, with other provisions concerning schools, etc., was made forever irrepealable without the consent of the United States; see Utah 3, 1. This is probably only a moral obligation; a State when once admitted comes in with all the rights of the older States. So far as this section is concerned, Utah could probably amend her Constitution and re-establish Mormonism to-morrow."

European legislation is necessarily more elaborate because

there is usually no body of existing common law. Trades-unions are universally made lawful, as they are with us. But in France in certain cases the consent of the government to the formation of such organizations is necessary; and the Code Napoleon made unlawful all combinations of persons with an "evil end." [1] So, "full freedom of association" is now guaranteed in Switzerland; and in Germany the trade guilds are largely recognized, but membership must not be compulsory. In Austria a strict governmental control is exercised, and the principle of obligatory guilds is unreservedly accepted. There does not appear to be any legislation upon strikes except in Great Britain, France, and Italy, such matters being left largely to the political or police authorities. Strikes were unlawful in England until comparatively recent times, but were always lawful in this country, and are so by the modern French law, which is much similar to ours, as is the case in Italy; but in Russia the leaders of a strike may be imprisoned.

In no country do I find any specific legislation as to boycotts, except the English statute already referred to, repealing the common law of conspiracy, both civil and criminal, in industrial disputes. Germany and Austria have blacklisting laws. The matter of riots, etc., is generally left to the criminal law to control. In no country other than the United States do I find any prohibition against a man's protecting his own property with private guards, armed or otherwise.

Arbitration laws in the British colonies are very generally aimed at the prevention of strikes. Otherwise there seems to be less legislation on the subject during the last ten years than might have been expected. The Orange River Colony has severe laws concerning the labor of the blacks, of a nature resembling our peonage laws in the Southern States. Similar conditions seem to lead to similar legislation throughout the modern world.

[1] Quoted in Dane's Abridgment, published in 1800.

Legislation is now much desired here also to obviate the effect of the Taff Vale case and that of the Danbury hatters which applies its principals to interstate commerce; that is to say, which shall secure the funds of a trades-union to its benevolent purposes, or even to its use in industrial disputes, strikes, boycotts, etc., without making it liable for the results of litigation. In these cases the moneys in the treasury of a trades-union, although unincorporated, have been held responsible for damages awarded in a suit brought against the union or its members for conspiracy under the Sherman Act, or otherwise. It is, however, difficult to see how such legislation with us could be devised so as to be constitutional, for it would necessarily extend only to a certain class of persons, and be framed to exempt them alone from a certain definite legal liability. Nevertheless it has in England been enacted.[1]

[1] See above, p. 268: The Trade Disputes Act, 1906, sec. 4.

CHAPTER XIII

MILITARY AND MOB LAW, AND THE RIGHT TO ARMS

We now come to a field of legislation related to the early English constitutional right to be protected from military law or molestation by the army, and the corresponding right of protection of one's person, or one's house, by force, if necessary.

The right of law, even as against the military, has been anticipated in an early chapter; the right to try an officer, or even a soldier obeying orders, in the ordinary tribunals, for homicide, or for ordinary trespass, as when, in the Dorr rebellion in Rhode Island, a company of militia invaded a woman's house.[1] The constitutional principle against the quartering of soldiers upon private dwellings, and the limitations to the military power caused by the strict confinement of the use of the army to cases of invasion or insurrection, have been added by American constitutions. But most important of all is the supremacy of the common law; the grudging permission of military law even to the army themselves only by a temporary vote; for in England, the Mutiny Act must be passed annually, and in the United States, appropriations for the army and navy may not last over two years. It is these statutes alone that make possible the very government of the army, the enforcement of the contract of enlistment, and the condign punishment of deserters.

For example, let us remember the Boston Massacre. Ten years before the Revolution, some turbulent men, mostly

[1] Martin *v.* Mott, 12 Wheaton, 19.

negroes, started a riot against British soldiers on what is now State Street (then King Street), and under the orders of the commanding officer the soldiers fired, and two or three men were killed. Yet although the colonies were already under military occupation, and their courts and legislatures more than unpopular with the home government, these British soldiers were tried for manslaughter and murder, not in England, but in the ordinary common-law courts of the Colony of Massachusetts. James Otis defended them and they were acquitted. The fact that a monument to Crispus Attocks, the negro, now stands on Boston Common, and that ten or twelve years later the British flag was expelled from Boston to seek refuge in New York, does not modify the significance of the incident. Some years since in a Pennsylvania strike a small company of militia, being attacked by a mob, were ordered to fire. They did so, and killed one of the striking rioters. It was found out which private had fired the fatal shot; he was indicted and tried for murder; and it was ruled that the order of the commanding officer was no defence.

These principles, we should be reminded, are fundamental; in our own country in time of peace, or even in time of war, except in hostile territory, there is no such thing as martial law; and no such thing as military law, except for the army itself, and then only by the sufferance of a biennial vote, which vote also limits the duration of existence of the regular army; besides which, all our State constitutions and the Declaration of Independence have a general provision against standing armies. The proclamations of military officers, of mayors of cities, or even State governors, declaring martial law, or suspending the writ of habeas corpus, are of no legal validity; this is true of a similar proclamation by the President of the United States, though it was frequently done by Abraham Lincoln. The act of Mayor Ruef of San Francisco, even at the time of the earthquake, declaring martial law, or giving troops or vigilance committees sum-

mary powers of punishment, was a mere "bluff." Such an order, though in practice obeyed by all good citizens, would in no way protect those acting under it from prosecution in the criminal or civil courts.

On the other hand, the right to bear arms is inherent under English ideas, and this alone, with the corresponding right of political assembly, has served largely to maintain English liberty; while the absence of these two important rights has relieved countries like Russia from all fear of revolution. One has only to read Mr. George Trevelyan's vivid account of the difficulties of the Garibaldi movement to free Italy in 1860, to realize the enormous difficulties under which the great patriot labored from the absence of these underlying principles. Indeed, but for the connivance of the Piedmontese government in allowing somebody to sell a thousand condemned rifles, it is probable that there would have been no revolution in Sicily.

Now this Anglo-Saxon right to arms goes back to times before the very dawn of the English Constitution, and the fyrd or local militia was in Saxon times, as it was declared to be by our American State constitutions of the eighteenth century, "the natural and only defence of a free country." This principle was very soon re-established after the Conquest. We find, as early as 1181, the Assize of Arms, which revives the ancient fyrd or militia. Twenty-two years before scutage had been substituted for military service; but this was merely a matter of feudal tenure. Yet so early was a direct call for troops forbidden to the crown. The contest of English ideals against Norman ideas was one of the principal causes of Magna Charta itself (it is significant that the Great Charter was never published in French); the barons were required to support the king in war, but complained against being led out of the kingdom; and King John's insistence upon this led to the assembly at Runnymede. Thus the militia and the maintenance of arms other than of feudal retainers—and this exception led to

the statutes against maintainors—passed out of the executive power and became the province of the legislative branch; a principle carried out in all our constitutions; they make the executive the commander-in-chief of the army, navy, or militia, but the governor may usually not command in the field, nor order troops out of a State; and the president cannot employ Federal troops *in* a State, except when requested by its legislature; save only where necessary to maintain the functions of the Federal government itself, or when a State government ceases to be republican in form—but of that last who is to be the judge?

With the doing away of direct military service, never yet to be re-established in England, though the threat of conscription is now made, disappeared the power of the king to control his people; and this prevented the establishment of a royal autocracy and the extinction of representative government which took place in every Continental State. It is a picturesque fact that mercenary soldiers were first employed in England in small numbers to suppress Jack Cade in 1449, who was leading a labor insurrection; just as the first instance where Federal troops were employed in intra-State matters in America was when President Cleveland sent them to suppress rioters interfering with the movement of mails in the Pullman strike in Chicago.

With standing armies abolished, and the fear of invasion removed, the practice of keeping arms fell into disuse, so that curiously enough we find under the Stuarts statutes compelling citizens to keep and bear arms, just as we find statutes compelling them to take their seats in Parliament. For quite three centuries we find no legislation concerning arms, and Hallam mentions that by 1485 six liberty rights were established, among them that "officers, administrators or soldiers are liable for their acts at the common law." It is not until 1679 under Charles II, the very year of the Habeas Corpus Act, that standing armies are definitely established in England, and the Mutiny Act concerning the

government of the army was first passed. The struggle of the people with the army under Charles I may be well shown by these quotations from the Petition of Right in 1628:

". . . of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses and there to suffer them to sojourn, against the laws and customs of this realm . . ."

". . . certain persons have been appointed commissioners, with power and authority to proceed . . . according to . . . martial law . . . and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought, to have been judged and executed."

And by the Bill of Rights of 1689:

"That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law."

"That the raising or keeping a standing army, within the kingdom in time of peace, unless it be with consent of Parliament, is against law."

Now it often happens that a great constitutional principle established with some difficulty in England is amplified and perfected by the bolder statement in American constitutions. Thus, the Virginia Bill of Rights, 1776, has the perfect definition:

"That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies in time of peace should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."

Similar declarations are found in the Declaration of Independence the same year, and the Massachusetts Bill of

Rights four years later; but the Virginia definition, being the work of Thomas Jefferson, is both the most compendious and the most concise, and is substantially copied in the Second and Third Amendments of the Federal Constitution. Modern legislation on the subject has found little to improve, although, with the ignorance of constitutional history too often found in modern statutes, we do find State laws which recognize martial law as a really existent domain of English and American jurisprudence. As our greatest jurists have often enough declared: "martial law" is nothing but the will of the commanding officer, the negation of all law, which exists when the courts do not sit and the writ of habeas corpus does not run. Even in these imperial days, I detect no tendency in the legislation of the States, or even of the Federal government in North America, to infringe upon these great principles of freedom. On the contrary, many State constitutions, as well as an act of Congress, declare that the writ of habeas corpus can never be suspended by the executive, but only by the people's representatives in the legislature. The prejudice against standing armies does not seem to be as strong, in that ours has recently been quadrupled in size; but this is probably no more than proportionate to our national expansion. Many of the States in this time of increasing civic disorder have had to give their attention to the suppression of mobs, and correspondingly we very generally find new complete codes governing the militia. Thus statutes are frequent exempting a private soldier from prosecution for murder when he fires under the orders of his commanding officer; and the honest judgment of the commanding officer is made a defence for all acts of his troops in attacking mobs, even to the point of fatalities resulting. Counties or cities are very generally made liable for damage to property done by mobs, and in some States for damage to life done by lynchers; the widow and children of the person lynched may recover damages. In Kansas, by a statute of 1900, it is made a misdemeanor for a bystander to refuse to

assist a sheriff in quelling a riotous disorder. Most significant, perhaps, of this militia legislation is that concerning its relation to the labor unions, and more significant still, the too apparent desire of labor unions to prevent their members from serving in the militia. Thus, New York and other States have already found it necessary to enact statutes prohibiting any discrimination against persons because they serve in the militia; prohibiting their employers from discharging them by reason of their necessary absence on such service, and forbidding the labor unions from in any way preventing them, or passing by-laws against their serving in the militia. Such by-laws are, however, unlawful under the common law.

The law-making most in the popular mind on this whole question is that concerning pensions. As is well known, the Federal pension list has swollen to a sum far in excess of the total expense of the standing army of Germany. An enormous number of Spanish War veterans who never even left the country are being added to the list, and their widows will be after them; the last survivor of such may not die before A. D. 2140, and the States themselves have not lagged far behind, all to the enormous corruption of our citizenship; indeed, one or two more wars (which the very motive of such wholesale pensioning is the more likely to bring on) would bankrupt the nation more rapidly than even our battleships. Not only that, but there is a distinct tendency to make a privileged class of veterans, and the sons of veterans—and perhaps we shall find of the sons of sons of veterans—by giving them preference in civic employment and special education, support, or privileges at the State's expense. Sometimes they get pedlar's licenses for nothing; sometimes they are to be preferred in all civic employment; sometimes they have special schools or asylums as well as soldiers' homes; sometimes they are given free text-books in the public schools. The Confederate States have not been behindhand in enacting similar laws for their own soldiers, despite the implied

prohibition of the Fourteenth Amendment; but Southern courts have held them void.

The general right to bear arms is frequently restricted by the prohibition of concealed weapons, or of the organization, drilling, and training of armed companies not under State or Federal control, both of which limitations have been held constitutional; and the legislation prohibiting the employment or importation of private armed guards, such as the Pinkerton men, has been already alluded to in our chapter on labor legislation. The precedent for the latter is to be found in the early English legislation against retainers; that is to say, the armed private guard, or "livery," of the great noblemen; whence is derived the custom of putting servants in livery. The legislation against private drill companies is closely allied, and had a somewhat amusing test in Chicago where, during a labor strike, a number of the strike sympathizers organized a so-called drill company and furnished themselves with guns, for the purpose really of intimidating the public and helping the law-breakers. Unfortunately it so happened, for this purpose, that the first time they sallied forth with sword and musket on warfare bent, they were stopped by one or two policemen on the nearest street corner, taken to the station-house, deprived of their arms, and locked up for the night. The next morning a fine was imposed upon their captain, who appealed to the United States Supreme Court without success.[1]

The legislation for giving damages for injuries to property done by mobs was tested after the Pittsburg riots of 1873, and that yellow metropolis was mulcted in heavy damages, which it took twenty-three years to pay off. But no damages in this country were ever given for criminal homicide directly, although there is an interesting case in the Federal Circuit Court of a gentleman in Georgia who was awaited by a party of neighboring gentlemen with the intention of shooting him up when he arrived. One of his friends

[1] Presser *v.* Illinois, 116 U. S. 252.

secretly got to the railway station and sent a telegram to his wife, shortly to become his widow, not to come. The Western Union Telegraph Company delayed the message, its operator being in sympathy with the gentlemen of the neighboring town, and the widow failed to recover damages from the telegraph company. But these modern statutes in Ohio and the Southern States, making towns responsible in a definite sum to the kin of a murdered man, are the exact re-enactment of the early Anglo-Saxon law; except that the blood damages—the were gild—were in those days put upon the neighbors or the kin of the enemy.

"Organized labor" is hostile to the use of the militia, still more of the regular army, in any labor dispute or riot resulting therefrom. It is never justifiably hostile where actual offences are committed, but there is something to be said, at least there is some precedent for their hostility, in cases where by the accident of Federal jurisdiction the whole power of the United States army is called in to back up the injunction of a judge, perhaps improperly issued. That is to say, if the parties to the dispute are citizens of the same State the National government may not interfere except, of course, where the mails or inter-State commerce are obstructed; but, by the mere accident that plaintiff and defendant come from different States—and this may nearly always be made the case by the plaintiff corporation, if it be a citizen of another State than where it owns its mine or operates its mill—it may always pick out strike leaders, walking delegates, who are citizens of another State, so that the litigation may be brought in a United States court. If, then, the orders or processes of that Federal court be interfered with, under the law of our Constitution the entire Federal government, first the Federal marshals and then the Federal army, may be called into the fight.

CHAPTER XIV

OF POLITICAL RIGHTS

Most important of these are the right to assemble, and the right of free election. The right of political assembly and petition is another principle which has been much broadened by American constitutions. In England the right of public meeting undoubtedly existed from early times, but it was tied to the right of petitioning Parliament, which obviously limited its scope; and always strongly contested by the kings. Many riot acts were passed, both by the Tudors and by the Stuarts, which sought to limit and restrict it, and even to make any meeting of more than twelve men a riotous and criminal assembly. Indeed, the history of the attempt of the authorities to prevent riotous assemblies quasi-political runs all the way from Jack Cade's Rebellion in 1452 to the Philadelphia street railway strike in 1910. By an Act of 1549 unlawful assemblies of twelve "to alter laws or abate prices" were made unlawful—one of the reasons that gave rise to the English notion that a simple strike was criminal. This, however, has nothing to do with the political right of assembly which, fully recognized by the Massachusetts Body of Liberties in 1641, was not definitely established in England until the Bill of Rights of 1689. Now this principle is cardinal, and so far as I know none of the States have legislated upon the subject, unless the limitation of the injunction writ be such legislation. A statute of Henry VII gave special authority to the Court of Star Chamber over riots; which is precisely the power now objected to by labor leaders when exercised by courts of chancery. But it must be noted that

this right of assembly only extends to matters political, and does not cover a meeting held for an end ordinarily unlawful, such as to bring about a riot or to work oppression to others or an injury to the public.

The right of election, however, is much older in England. We find statutes concerning the right of free election, that is, of allowing electors to vote without interference or control, as early as 1275. It is for this reason that almost from the origin of the House of Commons it has been unlawful, or at least uncustomary, for peers of the realm to even speak pending elections to the House of Commons. That House also vindicated its right to judge of elections against Elizabeth, and the principle that it alone shall be the judge remains in full force in the United States, though in modern times in England given to the courts. There is no constitutional principle in England as to the right of suffrage, which in early times was shared in by all free men, or at least landholders. It was in 1429 limited to the forty shillings freeholders, which law has been relaxed by degrees ever since. Our early constitutions recognized both property and educational limitations; these were all done away with at one time, except in Massachusetts and Rhode Island, the former retaining an educational, the latter a property, qualification. They have now been abolished in those States, but taken up in the South, for the purpose, of course, of disfranchising the negro vote.

The serious modern instance of interference with free election is that of the Federal government with State elections in the South during the thirty years following the war. While such interference was never quite held unconstitutional, it was strongly felt to be so; and has therefore disappeared from practical politics. The principle of free election, therefore, remains again unquestioned, and is, indeed, strengthened by considerable legislation aimed at the influencing of votes by employers, etc. Many States, for instance, require that Election Day shall be a holiday, or, at least, that

all employers of labor shall give part of the day, one or two hours at least, for the employees to vote; and a number of States have statutes aimed at the coercion of their vote by any promise of giving or withholding employment, or otherwise, and the giving their pay to them in envelopes upon which any political matter is printed. Bribery is nearly always made criminal and cause of permanent disfranchisement and disability to hold office, both to the person giving or receiving the bribe, but there is more interesting legislation still aimed at any form of political corruption. Massachusetts led the way with a statute which endeavors to make criminal any promise of employment or advantage, or even for a corporation, at least, to employ any person at the recommendation of any member of the legislature. It is very difficult to draw such laws to make them apply fairly, but they have been copied with even greater elaboration in many Southern States. The statute of Alabama, for instance, covers nearly a page in describing the various acts or promises which are thus forbidden to officers or candidates for office.

Then there is the long range of lobby acts aimed at the very serious abuse of lobbying. Massachusetts divides the offence, or rather the business, into two general classes: First, the legislative counsel who appears before legislative committees in support or in opposition of measures. This practice, of course, is perfectly legitimate in many cases, but the law provides that his advocacy must be open, he must disclose the client for whom he appears, if there be one, and at the end of his services file a statement of the counsel fees actually received. Such legislation, however, is easily evaded by the payment of an annual salary. Then there is the legislative agent or lobbyist, properly so called, who does not openly appear before legislative committees, but waylays members of the legislature at their dwelling or meeting places, or elsewhere. He must also register as legislative agent by the Massachusetts law, and file an actual account of his receipts and expenses. Such legislation properly ob-

served would, of course, have made impossible the celebrated "House of Mirth" at Albany. Then there are many statutes against intimidation in elections, particularly in the South; and there were many acts of Congress passed under the Fourteenth Amendment, but these have practically all been held unconstitutional.

The form of the ballot is another matter that has been the subject of much legislation. Our States vary, as does still public opinion in England, between the extreme of providing by the Constitution itself for the secrecy of the ballot, and the other extreme of requiring that all voting should be *viva voce*, as was formerly the case at least in Kentucky. Public opinion has universally settled in favor of the former; and to protect the voter's freedom, the so-called Australian ballot has very generally been adopted, the principle, of course, being a ballot on which all candidates' names are printed, with or without party designations, and against which the voter makes his mark. In their practical working, however, these laws depend on the simplicity of the form; thus, it works very well in Massachusetts, where the form is simple and the ballot short, and very badly in New York, where the contrary is the case. Opinion is pretty well united on the advisability of the Australian ballot, the only remaining difference being as to whether any party designations should be printed. Most practical politicians desire that the name "Republican" or "Democrat," or even that some party symbol like a star or flag, should be affixed, which can be understood by the most illiterate voter; also, that the voter should be allowed to make one cross opposite the word "Republican" or "Democrat" when he means to vote the whole of the ticket, "in order to give each candidate the benefit of the full party strength." On the other side it is argued that all voting should be intelligent and never blind, and that if the voter does not take the trouble to mark all the names on the ballot it sufficiently indicates that he is indifferent as to some of the candidates even of his own

party, and that his votes for them should, therefore, not be counted.

The most significant of modern developments in legislation concerning voting is the new practice of recognizing by law political parties, and of regulating by law the mode of their nominations. The old idea was that the law took no notice of anything that happened until election day, when it did regulate the mode of voting and counting the votes; the law was supposed to be blind to political parties; the persons elected were merely the successful candidates. But first began the tendency to recognize parties in "bi-partisan" boards and commissions; it became very usual to provide that State officials should, when the office was held, or the function performed, by more than one person, be elected or appointed from different parties. This, of course, works very well when there are but two parties, as indeed is usually the case. And now of late years the practice has grown up of regulating political matters *before* the election day. Direct primaries, caucuses regulated by law, the mode of nomination, nomination papers to be filed in a certain manner, the compulsory service of men as candidates unless they comply with precise formalities of resignation, the joint caucus and the separate caucus, the public nomination paper, the one-per-cent., three-per-cent. or five-per-cent. rule whereby a party gains such official recognition only by throwing such a percentage of votes at some previous election—in short, all the mass of legislation of this kind is the matter of the last few years. In the writer's opinion, with the possible exception of the public nomination paper, it is all mistaken. Aimed at destroying the machine, it really intrenches the machine—the professional politician—in power. The general public will not, and should not be compelled to do more work than is necessary. If they actually vote at election it is all that can fairly be asked of them and more than one-third of them do. They will not, and cannot, devote their time to politics all through the year. The result

is that all such elaborate schemes simply throw the game into the hands of the "town committee" or other permanent professional body. If you have to hold a meeting in June, and give notice of a caucus in July, with as much formality as used to be required in publishing the bans of marriage, and then on a certain day in August do something else, and in September something still more, and file with the Secretary of State nomination papers in October, and have everything complete ten days before election day,—the ordinary citizens who usually awake to the fact that there is an election about that time find it too late to have any voice in the nomination. They go to the election itself to find an official ballot with two machine candidates for each office, and no hope of electing, even were it possible to nominate, a third. In the old days, when they discovered that an improper candidate had been nominated, on the very eve of election they could arouse themselves and defeat him; under all these complicated systems it is too late. One necessity for such legislation, however, arises from the Australian ballot itself; when that ballot carries party designations, who is to determine who is the official party candidate? This problem is not, however, insoluble. Indeed, it might be argued that it would be an excellent test to require the various so-called party nominees to run together, leaving to the voter to determine who was the regular one. Certainly the legalizing of conventions, caucuses, and other nominating machinery, has led to great scandals. Under such laws, whoever first gets possession of the hall at the time named would seem to be the regular candidate. We have, therefore, in Massachusetts, seen the scandal of two groups of men making different nominations in a loud voice at the same time, one at the front of the hall, and the other at the back, and the courts had to decide who was the regular nominee. In the opinion of most lawyers, they decided in favor of those who ought to have been the nominees rather than of those who in fact were.

In the opinion of many "practical politicians," as well as

others, the whole mass of legislation that recognizes political parties and applies to anything happening up to the date of election, should be expunged from the statutes. I would hardly make an exception even of the "bi-partisan" board. A board should be composed of the best persons, not necessarily party-colored; if there be any force in the argument for bi-partisan commissions, it should apply ten times as much to the judges, but there is no provision in any State of the Union or in the National government for bi-partisan courts of law. Massachusetts, alone, so far as the writer is informed, of all the States, by a certain tradition respects this principle. Very few Massachusetts governors replace a Democratic judge by a Republican, or *vice versa*.

But most significant of all political matters is the growing distrust of legislatures. Curiously enough, although there was a great distrust of the executive of the nation until within a very few years, that seems to have entirely passed away. Governors of States have too little power to inspire distrust in anybody. But that legislatures or representatives of the people should fail to inspire their confidence is one of the most curious developments of modern politics. The matter has been fully discussed elsewhere in this book. It is greatly to be lamented, for it tends to lower the character of the legislatures themselves. The days are indeed far off when a man would prefer being governor of a State to president, ambassador, or judge of the Supreme Court; or the State Senate to the national Congress. Part of this indifference is, of course, explicable; for with the perfection of our civilization and the growing intelligence that most statutes have been enacted that are really needful, there is really less for the legislatures to do. Then, also, the growing practice of giving a large share of governmental, or even legislative, powers to boards and commissions has narrowed the scope of legislation. Whatever be the reason the fact is certain. Very few States now allow their legislatures to sit *ad libitum*, and only six or seven States permit annual ses-

sions. In nearly all States sessions are biennial, if not, as in some Southern States, quadrennial. That is to say, the legislature is only allowed to meet once in four years; and in more than half the States the time of the session is limited to ninety, sixty, or even thirty days, or the pay of the legislators cut off at the end of such period.

A few States have laws aimed at corrupt elections, that is to say, limiting the expenditure of candidates and requiring publicity. Most States now forbid contributions by corporations, as does the Federal government.[1] Thus, by the California law of 1893, expenditures are limited to one hundred dollars for each candidate, or one thousand dollars by a committee, and in no case exceeding five per cent. of the salary of the office for which the person is a candidate for one year, and the legitimate expenses are specified; that is to say, public meetings, printing, postage, and head-quarters expenses. Probably no one regrets the prevalence of extravagant expenditures more than persons who are themselves in public life. If the bosses of many State machines were consulted in private, they would agree that the only really legitimate expenditures are the hiring of halls, and the mailing of at most one printed circular to every voter in the district. The Missouri law of the same year fixes a limit of expenditure of one dollar per hundred of votes thrown at the last election for the office for which the person is a candidate, which, in an ordinary congressional district of say fifteen thousand voters, would be one hundred and fifty dollars—certainly little enough. Voters very generally have to be registered.

As is familiar to the reader, there has been a decided movement for the direct election by the people of United States senators, a large majority of the States, and the Democratic party in all States, having in the last few years expressed themselves in favor of a change in that particular. Until within a few years it was thought only possible by Con-

[1] Bill signed by President Taft, June, 1910.

stitutional amendment, but the example of Oregon and other States has shown that it may be done by means of a law providing for the expression of the preference of the voters, and this may even be made a party ballot. That is to say, voters at party caucuses, or even at elections where the ballots are so marked, may express their preference for this or that candidate for the United States Senate, and the moral obligation will then be on the State legislature, or at least on its members of the corresponding party, to vote for the candidate so nominated. This has been universally done in the case of election of the United States President by the force of public opinion; no instance is on record of an elector having voted differently, or of a bribe or even of an attempt to bribe. But with legislation—statute law not being so strong as the unwritten law, contrary to the popular opinion—it is by no means certain that this result will happen. The law has worked in Oregon, where first adopted, with the striking result that a Republican legislature elected a Democratic United States senator; but if the writer is correctly informed, the contrary has been the case in Illinois. The movement for the direct nomination of members of the lower house of Congress also exists in many States. "Direct nomination" of course means a nomination by the mass of voters, either in assembly or by a written list. The value of this reform is probably exaggerated. Direct nominations in the city of Boston recently had the somewhat amusing result that there were two or three times as many names on the nominating petitions as voted in the election, and that one gentleman, indeed, fell short of his nominating petition by nearly ninety per cent.

The mode of legislation is not much changed from the early days. Usually bills have in theory to be read three times and must be voted for by a majority of a quorum. Many States forbid new legislation to be attempted after the first few days of the session. There has in the last few years been an effort at the proper drafting of bills, but it

has hardly made much progress as yet, and will be discussed in our final chapter.

The two most radical changes of all are, of course, the initiative and referendum, and women's suffrage. The latter has, on the whole, made no progress since it was adopted in Colorado and three other States, about the year 1890. The people of the States where it exists appear satisfied and it is probable that they will never make the change back; on the other hand, the better opinion seems to be that the existence of women's suffrage has not materially altered conditions or results in any particular, except, possibly, that there is a little less disorder around the polling booths on election day. The largest city in the world where women vote is Denver; and in hardly any American town has the "social evil" been more openly prevalent or politics more corrupt; while it has just voted *against* prohibition. As in the case of school suffrage, it is probable that a smaller proportion of women are now exercising the right of suffrage than when the thing was a novelty. In all the neighboring States to the four women's suffrage States (Colorado, Wyoming, Idaho, and Utah) a women's suffrage amendment has been proposed to the Constitution, all the male voters have been given a chance to vote on the question, and in every instance it has been defeated by very large majorities. As has been intimated, the movement to extend the right of suffrage to women for all matters connected with schools and education has also been arrested. Many States had adopted this principle before the year 1895, but few, if any, during the past fifteen years. The experience of Massachusetts, where sentiment was strongly for it, shows that the women take very little interest in the matter; an infinitesimal percentage of the total female population voting upon election day, even when a prominent woman was the leading candidate for the school committee.

Women's suffrage was adopted in Colorado in 1895, and rejected in Kansas the same year; adopted in Idaho in 1896, and rejected in California; rejected in Washington and

South Dakota in 1898; rejected in Oregon in 1900, in both Washington and Oregon, once at least since, and has been rejected by popular referendum in several other States.

There is, however, an intelligent tendency, notably in the South, to recognize the right of women to vote as property owners upon matters involving the levying of taxes, or the "bonding" of cities, towns, or counties, for public improvements or other purposes. Such laws exist in Texas, Louisiana, Michigan, and possibly other States, and in Louisiana the statute provides machinery by which women may on such matters vote by mail. It is much to be wished that municipal affairs and municipal elections could be separated entirely from political ones. That is to say, that a city or town might be run as a business corporation on its business side, and in such elections have the property owners, both men and women, only vote. The trouble, of course, is that there are certain matters, notably the expenditure for schools, which is the largest, at least in Massachusetts cities and towns, which are in a sense both municipal and political, both economic and affecting individual rights of persons not property owners. In any case, the matter must be considered outside of the sphere of "practical politics." It is hardly likely that, except for some special matter like the race question in the South, a State constitution will ever be amended in a conservative direction. Allied with this would be a proposition to deprive persons in receipt of wages or salary from a city of the vote at municipal elections. Laborers and employees in the employ of a large city like Boston already form a very considerable percentage of the voters, and if you add to them the employees on the public-service corporations, partly under municipal control, you have probably got nearly one-third of the total vote. Yet the vote could not be taken from them without an amendment to the State constitution.

Of the initiative and referendum much has been written.

It exists in full force, that is to say, as applying both to State elections and to county, city, or town elections, in several States, mostly in the far West; and for partial purposes it exists in several more. "Direct legislation" has been very popular as a political slogan during the past few years, but it has not been adopted as yet in any of the thirteen original States. The objections to it are fundamentally that it destroys the principle of representative government; that it takes responsibility from the legislature with the result, probably, of getting a more and more inferior type of man as State representative; that it is unnecessary, inasmuch as any one may have any bill introduced in the legislature to-day, and public sentiment be effectual to prevent the bill from being defeated; and finally, the objection of inconvenience, that it is cumbrous and unmanageable to work. Already the Secretary of State of Oregon complains that the laws passed by initiative are so badly written as to be unintelligible and conflicting, to say nothing of bad spelling and grammar. In one instance, at least, an important statute, that for the initiative and referendum itself, adopted by initiative, failed of effect because it contained no clause beginning "Be it enacted," etc. Possibly with practice these objections might disappear. The more valuable part of the reform is undoubtedly the referendum. The initiative is hardly necessary, except by way of giving a referendum on measures which otherwise would not emerge from the legislature; and there is a growing inclination to give a referendum on all laws or measures involving a grant of a franchise or of a right or privilege at the expense of the general public, or the town or city concerned. This is a very distinct tendency, and throughout the Union the States are rapidly passing laws that where a State-wide franchise is given, an exemption from taxes, a rate-making power, or other privilege, it shall be submitted to all the voters, and corresponding measures, street-railway franchises, gas, light, water, or other public-service corporations, acting only in

definite localities, cities or towns, shall be referred in the appropriate locality.

The method of the State-wide initiative or referendum varies little in the different States; usually, upon petition of from five to eight per cent. of the voters, or in cities and towns usually fifteen per cent., legislation may be initiated. It may then be either passed by the State legislature like an ordinary law, or be given to the referendum of the people, or both, and takes effect when adopted by a majority of the voters at a general or special election. Constitutional amendments may in some States be originated and adopted in the same manner. So far as one can judge, the referendum in this country shows the same tendency that it has shown in Switzerland. Although a larger number of measures are doubtless submitted to the people, and especially measures of a class not to go through the ordinary legislature, when controlled by important interests, yet the vote itself at the final election is apt to be somewhat conservative. The referendums upon women's suffrage, for instance, while the initiative was adopted by a large majority, were very decisively defeated at the polls, and it is said that last year's election in Oregon and Washington, with very numerous and complex referendum measures, showed a surprising degree of intelligence on the part of the ordinary voter. Nevertheless, while it may be possible to submit to him one or two measures a year, if it were to come to the submission of all legislation (and the States will average from five hundred to one thousand statutes per year, at their present output) it seems incredible that the voter should have time and intelligence, or even take the trouble, to mark his ballot accordingly; while it is obvious that the ballot itself, setting forth the full law, would be considerably larger than the annual volumes of statutes now are. This matter of practical convenience, however, may perhaps be expected to cure itself. I should conclude, therefore, that while the whole matter is an interesting experiment, the initiative is hardly necessary,

and the referendum should be limited to constitutional amendments (where it was always allowed) and to matters of definite local or public interest, like the granting of a franchise or an irrepealable contract of privilege.

The modern practice of putting everything into the State constitution which we have called attention to in other places, has led, of course, to a practical referendum on all most important matters, for no constitution, with the exception of that of Virginia, has ever been adopted in any of our States except by the people at an election; and with the tendency to require the submission of a new constitution every twenty years, and to make the constitution itself so compendious as to cover a vast amount of matter, usually subjects of legislation, with the consequent necessity of frequent amendment, we have now in our Southern States and some of the Western States a practical referendum to the people of most important legislative matters every few years.

The initiative and referendum was adopted in Iowa in 1891. As to bonds and debts of cities, etc., in Ohio in 1902. In Oregon, the general initiative and referendum by constitutional amendment in 1903. As to franchises for public utilities only, in Wisconsin, Montana, and Arizona the same year. As to Chicago, Illinois, in 1904, and in several States, what we will term the local or limited referendum, in the last four or five years. It was, however, defeated in Massachusetts, although adopted in Maine; and in Delaware the whole question was submitted to a commission to investigate.

The recall, a still more recent device than the initiative and referendum, has, indeed, no precedent in the past, or in other countries. In substance, it makes the tenure of office of an elective official dependent on the continuous good-will of the voters, or of a certain proportion of the voters. Under the present charter of the city of Boston, the mayor may be "recalled" upon petition of fifty per cent. of the registered voters—a proportion which practically makes the recall impossible. Where, however, the initiative of the recall depends

on a small proportion and the result is determined by a simple majority vote at the polls, it is easy to see that the mayor or other official would be in continuous apprehension, if he cared for his office, and in any event would not be able to adopt and follow out any continuous policy. The terms of most of our officials are brief. A proposal to apply the "recall" to judges would, in the opinion of the writer, be wicked, if not unconstitutional; as to all other officials, it would tend to destroy their efficiency, and in most cases be in itself ridiculous, at least as to short-term officers holding for only one or two years.

One of the most noteworthy of political changes that have occurred in the republic since the adoption of the Constitution in 1789, is that affecting the election and tenure of office of judges. Smith, in his book on American State Constitutions, published shortly after the Revolution, tells us that at that time every State in the Union had its judges appointed by the executive for a life term. To-day, this principle survives only in the Federal courts and four States, New Hampshire, Massachusetts, Maine, and Delaware, although in Connecticut, New Jersey, and Mississippi, the judges of the highest, or Supreme Court, are still appointed in this manner and for life. In Vermont, Rhode Island, Virginia, and South Carolina, Supreme Court judges are elected by the two houses of the legislature in joint convention, but in all other States, that is, universally in the West and Southwest, the judges are elected by the people of the States or of their respective districts. New York and Pennsylvania, however, have very long terms, which by some is said to combine the advantages of both systems; in other States the term is from four to six years.

In matters judicial the field is far too vast to permit more than briefest mention of the most important lines of popular legislation. In the first place, common law and chancery jurisdiction are very generally fused and confounded. A few States still have chancellors entirely distinct from the

common-law judges, and Massachusetts and a few other States still keep chancery terms and chancery procedure distinct from the common law. It is certainly a curious result that the historic jealousy of chancery and all its works should have ended, in the most radical States of the Union, in their complete adoption of the whole system of chancery with all its concomitants. As a result, the injunction writ, originally the high prerogative of the crown and its highest officers, has now become the weapon of all judges, even in some States of inferior magistrates, and has been used with a confusion and recklessness that have gone far to justify the complaint of labor interests.

On the other hand, we have grown less jealous of preserving our common-law jury rights. Not only is much more provision made for the waiver of jury trial in all States, at least in criminal cases, and for a trial by the court without a jury unless it be specially claimed, but there is a distinct tendency to have juries less than twelve in number, and verdicts not unanimous, but made up of three-fourths, two-thirds, or even a simple majority; while our indifference to common-law rights shown in our multiplication of boards and commissioners has already been commented on.

Legislation on the law of evidence has been on two main lines, originally, of course, under the Federal Constitution, to destroy all religious tests, and permit an atheist or person of heathen religion to testify upon simple affirmation, or according to his religious tenets. Universally, persons charged with crime have been permitted to testify in their own defence, with the common provision that no inference shall be drawn from their not doing so. Of course, by our Constitution itself, they were given the right to counsel and compulsory process for obtaining evidence on their own behalf, neither of which rights existed under the old common law; and then almost universally the wife is permitted to testify against the husband or in his behalf, especially in cases involving controversy between them; while, as she is

very generally given the right to make contracts even with the husband, she is naturally given the right to enforce the same in civil courts as well.

It is in procedure that our legislation is least efficient. Having little knowledge of the subject, legislatures have been shy of meddling with court rules and processes; while the very fact that the legislatures have taken unto themselves the right so to interfere, has seemed to impress both bench and bar with a certain sense of irresponsibility. I fear we must admit that the judges of England, aided by its bar, have been far more solicitous of speedy and simple procedure and trial than have the courts of this country. Some Western States have crudely tried to meet the difficulty, as by providing that all judges must render an opinion within sixty days, or other brief period, after a case is argued before them, or even by limiting the number of witnesses to be called! But it may be feared that so long as public sentiment rather demands every possibility of evasion of execution than that a guilty person should be promptly and summarily punished, little can be hoped for from the legislatures. Such progress as has been made in this direction has universally been under the urgent instance of the lawyers themselves, acting through the State or Federal bar associations. But the judges themselves must venture a stricter control of irrelevant testimony.

XV

OTHER LEGISLATION AFFECTING INDIVIDUAL RIGHTS

Legislation concerning freedom of speech and its limitations, the law of slander and libel, hardly exists in America, except only the efforts of newspapers to be free of the consequences of libels published by them, provided they publish a retractation; and the efforts of the people to protect their reputation and right to privacy, as by laws like that of the State of Pennsylvania prohibiting ridiculous or defamatory cartoons, even of persons in public life; and the legislation already attempted in some States to prohibit the use of a person's likeness for advertising purposes, or to protect them from the kodak fiend, or even to establish a general right to privacy as to their doings, engagements, social entertainments, etc., when they are of no legitimate interest to the public. Legislation in these directions has, however, only made a beginning.

The newspaper-libel laws usually provide that the retractation shall be a defence to a libel suit, at least if published in as large a type and in as conspicuous a manner as the original article complained of; sometimes they only provide that in such cases the newspaper shall be relieved of all but actual damages. The wisdom of such legislation is questionable, as the old adage runs: "A lie will travel around the world while the truth is putting on its boots"; moreover, it is questionable whether they are not class legislation in extending to a certain form of business or a certain trade a protection which is not extended to others. There has been

much legislation preventing the advertising of patent medicines, immoral remedies, divorce advertisement, and such matters. Some newspapers have objected to it, but the right of freedom of the press does not include the right to the use of the mails, and the papers containing the objectionable advertisements may constitutionally be seized or denied delivery, just as convict-made goods may be denied circulation in interstate commerce, by act of Congress, not, of course, of the States. Mr. Gompers, of the American Federation of Labor, has complained that the injunction of their so-called "unfair list" is an interference with the freedom of the press, and I presume would claim that an injunction against urging, or combining to urge, by oral argument, the members of the various unions throughout the country to boycott a certain person, would be an interference with the right of freedom of speech, and that therefore if the courts did not so decide, the laws should be changed by statute. This, also, would seem open to the objection of class legislation if extended only to speech or publication in industrial disputes. It should be noted, however, that the broad principle of freedom of speech by all persons and at all places is first adopted in the American constitutions, freedom of speech in England in its historical principles extending only to freedom of speech in the House of Parliament, and the right of assembly and petition at a public meeting; freedom of the press, however, is the same constitutional principle in both countries, but only extends to the right to publish without previously obtaining the consent of any censor or other authority, and the person publishing still remains responsible for all damages caused by such act. It is this part of the law which Mr. Gompers would alter, or rather make absolute; so that any notice or threat could be printed and circulated even when a component act of a conspiracy.

By a recent act of Congress the right of freedom of speech does not extend to anarchistic utterances, or speeches or writings aimed against order, the established government,

and inciting to assassination or crime. Such laws are barely constitutional as applied to United States citizens. The unpopularity of the alien and sedition laws under the administration of John Adams will be remembered. Since their repeal, no attempt at a law of government libel has been made; very recently, however, where certain gentlemen, mostly holding important government offices, were charged with having made money out of the Panama Canal purchase, the weight and influence of the administration was given to the attempt to indict them and bring them to the courts of the central government at Washington for trial. This attempt, however, failed in the courts, as, in the Wilkes case, it had failed more than a century before at the bar of public opinion.

But the law is, of course, much stronger as to persons not citizens. That is to say, no one has any right to immigrate into this country, and therefore intending immigrants may be kept out by legislation if they are anarchists, socialists, or, indeed, hold any opinion for the moment unpopular with Congress. The attempt has so far, however, not been made to keep out any but violent anarchists, and, of course, persons who are diseased, of immoral life, or likely to become a public charge. And the attempt to keep them under the hand of the central government for years after they have taken their place for good or ill in the State body politic has recently failed in a monumental case vindicating anew the Tenth Amendment.

Connected in most people's mind with the right of privacy is the right of a person to keep his house and his private papers to himself; but it bears no relation whatever to the very new-fangled notion of a general right to privacy. The two principles are that an Englishman's house is his castle. His home, even though it be but one room in a tenement, may not be invaded by anybody, even by any government official or authority (except, of course, under modern sanitary police regulation), without a written warrant specifying the reason

for such invasion, some offence with which the man is charged, and some particular document or paper, or other evidence of which they are in search. The principle against general warrants—that is, warrants specifying no definite offence or naming no particular person—was established in Massachusetts in Colony times, and the principle taken over to England and affirmed by Lord Camden—one of the two or three celebrated examples where we have given a new constitutional principle back to the mother country. Now, closely connected with this is another principle that a man shall not be compelled to testify in a criminal matter against himself, or that, if so compelled by statute or official, he shall then forever be immune from prosecution for any crime revealed by such testimony; the wording of the earlier constitutional provisions was "in a criminal offence," but by modern, more liberal interpretation, it has been extended to any compulsory testimony, whether given in a criminal proceeding or not. This, with the principle protecting a man's private affairs from inquisition, is expressed in our Fourth and Fifth Amendments, the former prohibiting unreasonable searches and general warrants, and the latter providing that no one shall be compelled in any criminal case to be a witness against himself, nor deprived of property without due process of law, and it has reasonably been argued that an inquisition into a person's business or book of accounts is such deprivation of his property without due process of law, at least when applied to a natural person. I find no legislation limiting these important principles, but on the contrary the tendency in modern statutes and modern State constitutions is to extend and generalize them. Of such is the famous clause of the recent constitutions of Kentucky and Wyoming that "absolute arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority." In view of the frequently successful efforts of trust magnates and others to escape indictment or punishment by some enforced revelation of

their affairs given after a criminal proceeding has been commenced or before a grand jury, legislation is now strongly urged to withhold them immunity in such cases. This would relegate us to the early state of things where they would simply refuse to answer, so that it may be doubted if, on the whole, we should gain much. The right of an Englishman not to criminate himself is too cardinal in our constitutional fabric to be questioned or to be altered without subverting the whole structure. Practically it would seem as if a little more intelligence on the part of our prosecutors would meet the evil. Corporations themselves are never immune; and unless the wicked official actually slept with all the books of the corporation under his pillow, it would be hard to imagine a case where some corporate clerk or subordinate officer could not be subpœnaed to produce the necessary evidence. Indeed, as has been well argued by leading American publicists, the sooner the public learns to go behind the figment of the corporation, the screen of the artificial person, into the human beings really composing it, the quicker we shall arrive at a cure for such evils as may exist. Legislation punishing or even fining an offending corporation is in the last sense ridiculous. It is necessarily paid by the innocent stockholders or the public. There is always some one person or a number of persons who have *done* or suffered the things complained of; after all, every act of the corporation is necessarily done by some one or more individuals. We must get over our metaphysical habit of treating corporations as abstract entities, and again recognize that they are but a definite number of natural persons bound together only for a few definite interests and with real men as officers who should be fully responsible for their actions. Indeed, it ought to be simpler to detect and punish offenders than in the case of mere individuals unincorporated, for the very fact that a corporation keeps books and acts under an elaborate set of by-laws and regulations gives a clew to its proceedings, and indicates a source of information

as to all its acts. One clerk may therefore reveal, and properly reveal, books and letters which shall incriminate "those above"; one employee may show ten thousand persons guilty of an unlawful combination, and properly so. There is no reason why he should not, and the nine thousand nine hundred and ninety-nine others deserve, and are entitled to, no immunity whatever from his revelation.

The religious rights, although for the most part peculiar to the American Constitution, adopted by us, indeed, as a result of the history of the two or three centuries preceding in England, but hardly in any particular a part of the British Constitution, were by the reason of our very origin so strongly asserted and so highly valued with us that no legislation has been found necessary on the subject. Perhaps the sole important instance in which the question has come up has been that of instruction in the public schools and the use of the money raised by common taxation for special religious purposes. Very generally the latter is forbidden in our State constitutions, the Federal Constitution by the First Amendment merely protecting the right from the action of Congress. Owing to decisions of the Supreme Court, in the South it has become possible to divide school appropriations between schools for whites and blacks, and it is presumable that the same thing might be done as, for instance, between Roman Catholics and others, and something of the sort has, I believe, been done with the appropriations for the education of Indians.

The few statutes we find upon this matter tend to still further extend and liberalize religious rights. Almost universally now a man is not forbidden from testifying or being a witness by reason of his belief or disbelief, even when he is an atheist. The latter law is not, however, quite universal. He must, in some States, believe at least in the existence of God, or of a future state of reward or punishment. Mormons, at one time, claimed the right to practise polygamy as a part of their religion guaranteed to them by the Con-

stitution; the contention did not prevail; on the contrary the Mormon States were made to submit to an enabling act under which they bound themselves to adopt State constitutions providing for all time against polygamous practices. Such a treaty is not, of course, binding upon a sovereign State unless Mormonism be deemed inconsistent with a republican form of government; so that Utah, for instance, has probably the right to re-establish Mormonism to-morrow so far as the Federal Constitution is concerned. Whether it would be permitted by a strenuous president having public sentiment at his back may indeed be questioned. In like manner, Christian Science practitioners have invoked the constitutional right of religious belief against the common law requiring that those offering themselves to practise medicine should be reasonably skilled in their trade. Legislation permitting Christian Scientists to practise freely has been attempted in nearly all the States, but has not, so far as I am informed, succeeded in any, although a good many States have adopted statutes extending the right to osteopaths. Under the common law of England, re-established in Massachusetts by a famous decision [1] twenty years ago, a person holding himself out as a surgeon or medical practitioner, who is absolutely uninstructed and ignorant, is guilty even of criminal negligence, and responsible for the death of his patient, even to the point of manslaughter.

[1] Commonwealth *v.* Pierce, 138 Mass. 165.

XVI

LEGISLATION CONCERNING PERSONAL AND RACIAL RIGHTS

This is, of course, a matter of which books might be, and indeed have been, written; our general essay on popular legislation can do no more than summarize past law-making and the present trend of legislatures, much as some history of the people of England might broadly state the economic facts and laws of the Corn-law period in England. Racial legislation may, of course, be considered from the point of view of the negro, the Indian, and the alien, and indeed it differs much in all three. Other personal legislation is largely concerned with the right to exercise trade, already discussed, and the questions of marriage and divorce we reserve for the next chapter. In the past we have been very unjust, not to say cruel, to the Indian, and though naturally in some respects a high-natured race, have constantly denied him any political share in the government, and only in the very last few years grudgingly extended it to such Indians as renounce their tribe and adopt the habits and mode of life of the white man, or, as in early England, to such freeholders as acquire a quarter section of land. In the negro's case, however, we atoned for the early crime of enslavement by the sentimental hurry with which we endeavored in the '60's and '70's of the last century to take him up by law and force him into exact equality, social as well as political, with the white man. To aliens, in the third hand, we have been consistently generous, having shown only in the very last few years any attempt whatever to exclude the most worthless or undesirable; except that the prejudice against the Mongo-

lian in the far West is quite as bitter as it ever was against the negro in the South, and he is still sternly refused citizenship, even national citizenship, which we freely extend to the African. We are thus left in the ridiculous situation of providing that nobody may be a citizen of our great Republic except a white Caucasian and a black African, with considerable ambiguity still as to what the word "white" means. The American Indians are, indeed, admitted under the conditions before mentioned, so that as a catch-word the reader may remember that we are a red, white, and black country, but not a brown or yellow one. All this is, of course, the accident of history; but the accidents of history are its most important incidents.

Taking Asiatic races first, the far Western States vie with each other in passing legislation which shall deny them the right to life, or at least to live upon any equality of competition with the white. Most of such laws are, of course, unconstitutional, but they were at one time enacted with more rapidity than the Supreme Court of the United States could declare them so. Congress tries to be more reasonable and, indeed, has to be so, in view of the fact that it is a national Congress living, with the executive, in direct touch with the foreign nations themselves. Broadly speaking, our national legislation is to exclude immigration, but guarantee equality of property right, at least, to such Mongolian aliens as are actually in the country; and to extend or guarantee such right of treatment by treaties, which treaties are, of course, acts of Congress, like any other act of Congress, entirely valid in favor of the foreign power and enforceable by it even to the issue of war, but possibly, as a constitutional question, not enforceable by the Federal government against the States. An endless mass of legislation in California and other Western States has been devised, either openly against the Chinese or so couched as to really exclude them from the ordinary civic liberties, and most of our State laws or courts declare that the Japanese are Mongolian although that peo-

ple deny it. Many statutes, moreover, are aimed at Asiatics in general; which would possibly include the Hindoos, who are of exactly the same race as ourselves. Indeed, some judges have excluded Hindoos from naturalization, or persons of Spanish descent, while admitting negroes, which is like excluding your immediate ancestors in favor of your more remote Darwinian ones. Even in New York and other Eastern States, the employment of aliens, particularly Asiatics, is forbidden in all public work—which laws may be invalid as against a Federal treaty. Yet statutes against the employment of any but citizens of the United States in public works are growing more frequent than ever, and seem to me quite within the rights of the State itself to determine. But Pennsylvania could not impose a tax of three cents per day upon all alien laborers, to be paid by the employer. Many States are beginning to provide against the ownership of land by aliens. This, of course, is perfectly constitutional and has full justification in the history and precedent of most other countries, and as applied to foreign corporations it is still more justifiable; and the Western States very generally provide against the ownership of land, other than such as may be taken on mortgage, by foreign corporations, or corporations even of which a large proportion of the stock is held by foreigners.

Racial legislation as to negroes may be divided into laws bearing on their legal, political, and social rights, including, in the latter, contracts of labor and of marriage. By the Thirteenth, Fourteenth, and Fifteenth Amendments, all adopted within ten years after the war, we endeavored to put the negro in a legal, a political, and a social equality with whites in every particular. A broad statement, sufficiently correct for the general reader, may be made that only the legal part has succeeded or has lasted. That legislation which is aimed at social equality, all of it Federal legislation, has generally proved unconstitutional, and that part which has been aimed at political equality has, for one reason or

another, been inefficient. Moreover, the great attempt in the Fourteenth Amendment to place the ordinary social, civil, and political rights of the negro, and necessarily, therefore, of every one else, under the *ægis* of the Federal government, Federal courts, and Federal legislation, has been nullified; first, by court decision, and later, if we may trust the signs of the times, by contemporary public opinion. The only thing that remains is that the States cannot make laws which, on their face, are discriminations against the negro, or in social matters against any other race; and in political matters, the Fifteenth Amendment has proved effective to render null State laws which on their face are designed to restrict or deny their equal right of suffrage.

Legislation concerning labor, the industrial condition, and contract rights of the negro, such as the peonage laws, we have considered in an earlier chapter; both State and national laws exist, and the Thirteenth Amendment, being self-executing, has proved effective. Under the Fifteenth Amendment there is little political legislation, except the effort in Southern States by educational or property qualifications, and most questionably by the so-called "grandfather clause," to exclude most negroes from the right of suffrage. Laws imposing property and educational qualifications are, of course, valid, although designed to have the effect of excluding a large proportion of the negroes from voting; laws, on the other hand, which give a permanent right of suffrage to the descendants of a certain class, as of those voters, all white, who were entitled to vote in Southern States in the year 1861, are probably unconstitutional as establishing an hereditary privileged class, though there has as yet been no square decision on this point by the Supreme Court of the United States. But as there is no further legislation on these subjects, to pursue the matter further would carry us into constitutional law.

In the third field, that of social legislation, there has been a vast number of laws, first by Congress with the intention,

under the Fourteenth Amendment, of enforcing social and industrial equality and providing Federal machinery for securing it (the great substance of this has been held unconstitutional and has passed away); later by the States, usually the Southern States, with the exactly opposite purpose of separating the races, at least in social matters, and of subjecting them to a stricter law of labor contract than has, in our country at least, been imposed upon other citizens.

Even this matter of social legislation, which alone remains to be discussed in this book, is quite too vast for more than a brief sketch. Among the many monographs on the subject may be mentioned the article of G. T. Stevenson on the "Separation of the Races in Public Conveyances." [1] Even this comparatively narrow matter is by no means exhausted in an article covering twenty pages. Much of the social separation of the races is, of course, brought about without statute law, but by custom, or even we may say customary law, which is always apt to be the better enforced; and under the civil rights decisions of the United States Supreme Court in 1883, such customary law has been rendered immune from Federal control. Legislation now exists in all Southern States as to separate, though equal, accommodations in public conveyances; at one time such statutes were restricted to interstate commerce, but the present tendency of court decision appears to be to recognize even their interference with interstate commerce as part of the reasonable State police jurisdiction. Such statutes apply generally to railroads, steamboats, and street cars, or other conveyances of transportation. They are not so usual as to hotels, eating-houses, theatres, or other public places, probably because in such it is more easy to secure the desired segregation without legislation. We may, therefore, conclude that legislation on this point will be universal in the South and in Oklahoma or other border States with Southern sympathies, and will not be declared unconstitutional by the courts.

[1] *American Political Science Review*, vol. III, No. 2, 1909.

The labor unions very generally exclude negroes, both in the South and North, and in many Southern States the whites refuse to work with negroes in mills. Until and unless labor unions are chartered or incorporated under legislation forbidding such action, it is probable that their by-laws excluding negroes, though possibly unreasonable at the common law, could not be reached by the Fourteenth Amendment; and public sentiment in the States where such by-laws are common would probably prevent any permanent vindication of the right of the negro to join labor unions by State courts. That is to say, countervailing legislation would promptly be adopted.

Coming to education, the same principle seems to be established, that if the facilities are equal the education may be separate for the different races, just as it may be for the different sexes; and it would even appear that when the appropriation is not adequate for giving higher or special education to both races, particularly when there are few negroes applying for it, high-schools or special schools may be established for whites alone.

Coming to the matter of sexual relation, a different principle applies. Under their unquestioned power of defining crimes, their police power in criminal and sanitary matters, the States may forbid or make criminal miscegenation. Cohabitation without marriage may, of course, be forbidden to all classes, and in the case of cohabitation between white and black the penalty may be made more severe, for it has been held that as both parties to the offence are punished equally, there is, under such statutes, no denial of the equal protection of the law. *A fortiori*, marriage may be forbidden or declared null between persons of different race, and the tendency so to do is increasing very decidedly in the South, and is certainly not decreasing in the North. Indeed, constitutional amendments are being adopted and proposed having this in view, "the purity of the race." Recent plays and magazine articles, with which most of our readers will be familiar, sufficiently bear out this point.

In property rights, however, I can find no legislation which discriminates against the negro, and there is some in his favor. With the exception of the labor or peonage laws, discussed separately, I have found no legislation which limits his property or contract rights. On the other hand, there is, in the several States, legislation requiring that he shall be given life or health insurance policies on the same terms and conditions as are applied to whites, despite the alleged fact that his expectation of life is less and not so easy to determine, owing to the lack of information as to the health and longevity of his forebears. Sketching first thus our general conclusions it remains for us only to give a few concrete examples drawn from the legislation of the last twenty years:

In 1890, soon after the civil-rights cases were decided, we find some State legislation to protect the negro in his civil rights; but the first "Jim Crow" laws, providing for separation in public conveyances, etc., began in 1865 and 1866 in Florida, Mississippi, and Texas, and are continued in other States in this year. In 1892 there are laws for separate refreshment rooms and bath-houses, and providing that negroes and whites shall not be chained together in jails. In 1893 there is legislation for separate barber shops, and the first law requiring equal treatment by life-insurance companies is passed in Massachusetts. In 1895 there is legislation against the mixture of races in schools. In 1898 the laws and constitutional provisions for practical negro disfranchisement begin in South Carolina, Mississippi, and Louisiana. On the other hand, in 1900, New York passes a statute that there shall be no separate negro schools, and in 1901 Illinois adopts civil-rights laws, followed in 1905 by five other States. In 1907 South Carolina makes it a misdemeanor to serve meals at station eating-houses to whites and blacks in the same room. In 1908 Maryland and Oklahoma provide for separate cars and separate rooms. In 1894 we find nine States prohibiting miscegenation. In 1902 Florida makes miscegenation a felony, and in 1908

Louisiana declares concubinage between a Caucasian and a negro to be also a felony, while Oklahoma adopts the miscegenation law.

These examples of legislation are not intended to be exhaustive, but will serve to give the reader a general idea of the trend of popular law-making in this important matter.

Personal privilege, depending not upon race, but upon legislation, or inheritance, is, of course, strictly forbidden in each State by both constitutions, State and Federal. The growth of a contrary principle is only noteworthy on the two lines touching respectively the whites in the South and veterans of wars in the North. It must be said that legislation in the interest of the Grand Army of the Republic, and even of the veterans of the Spanish War, and even in some States of the sons or descendants of such veterans respectively, has come very near the point of hereditary or social privilege. The struggles of so-called "Organized Labor" to establish a privileged caste have so far been generally unsuccessful, always so in the courts, and usually so in the legislatures; but in many States those who have enlisted in either wars, Civil or Spanish, wholly irrespective of actual service or injury, are entitled not only to pensions, Federal and State, but to a diversity of forms of State aid, to general preference in public employment, and even to special privilege or exemption from license taxes, etc., in private trades, and their children or descendants are, in many States, entitled to special educational privilege, to support in State schools or industrial colleges, to free text-books, and other advantages. Presumably some of these matters might be successfully contested in the courts, but they never have been. As to pensions, nothing here need be said. The reader will remember the familiar fact that our pensions in time of peace now cost more than the maintenance of the entire German army on a war footing or than the maintenance of our own army. The last pensioner of the Revolutionary War, which ended in 1781—that is to say, the last widow of

a Revolutionary soldier—only died a few years ago, early in the twentieth century. The Order of the Cincinnati, founded by Washington and Lafayette, was nevertheless a subject of jealous anxiety to our forefathers; but apparently the successful attempt of volunteers disbanded after the Civil and the Spanish Wars, although far more menacing because embodying social and political privilege, not a mere badge of honor, seems to call forth but little criticism.

XVII

SEX LEGISLATION, MARRIAGE AND DIVORCE

The notion that a woman is in all respects a citizen, entitled to all rights, political as well as property and social, was definitely tested before our Supreme Court soon after the adoption of the Fourteenth Amendment, on the plea that the wording of that amendment gave a renewed recognition to the doctrine that a woman was a person born or naturalized in the United States and therefore a citizen and entitled to the equal protection of the laws. The court substantially decided [1] that she was a citizen, was entitled to the equal protection of the laws, but not to political privileges or burdens any more than she was liable to military service. The State constitutions of many States, among them Illinois, have provided that a woman is entitled to all ordinary rights of property and contract "the same as" a man. Under this provision, when laws were passed for the protection of women, forbidding them to work more than a certain number of hours per day, they were originally held unconstitutional. The so-called women's-rights people (one could wish that there were a better or more respectful word) seem themselves to be divided on this point. The more radical resent any enforced inequality, industrial or social, between the sexes. For instance, many States have statutes forbidding women or girls to serve liquor in saloons or to wait upon table in restaurants where liquor is served. Such statutes, obviously moral, are nevertheless resented. On the other hand, the Supreme Court of the United States has taken the conservative view, that there is a difference both in phy-

[1] Minor *v.* Happersett, 21 Wallace 166.

sique and character between the sexes, as well as different responsibilities and a different social interest, so that it is still possible, as it has been possible in the past, to impose by law special restrictions on the contracts of women. The law of Oregon, therefore, not permitting them to make personal contract for more than eight hours per day was sustained both in the State and the Federal Supreme Courts; and a similar law by the highest court of Illinois, reversing its own prior decision.[1] This matter is of such interest and of such importance that it is frequently placed in State constitutions, and it seems worth while to summarize their provisions. The advanced position is now squarely put only in the constitution of California, which provides that no person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession. Such a constitution as this would, of course, make it impossible even to pass such laws as the ones just mentioned forbidding them to serve in restaurants, such employment being lawful as to men. But no other State follows that extreme provision, and, indeed, the clause in the constitution of Illinois seems now to have been repealed.

As to property matters it may be broadly stated that they have in general precisely the same rights that men have, and in several States more; that is to say, a woman frequently has a larger interest in the property of a man at his death, than the man has in hers, should she predecease him; and universally she is given a share of the husband's property in case of divorce, either outright or by way of alimony, which, so far as I know, is never awarded to the man even if he be the innocent party. In New Jersey and some other States, a married woman is not permitted to guarantee or endorse the notes or debts of her husband. Many of the Southwestern States, from Louisiana to California, recognize or adopt the French idea of community property. By the Mississippi constitution "the legislature shall never

[1] See above, p. 227.

create by law any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property of all kinds, or other power of contract in reference thereto." But this does not prevent laws regulating contracts between husband and wife.

In matters of divorce and personal relation, such as the guardianship of children, the tendency has also been to put women on an equality with men and more so. That is to say, divorces are awarded women which for similar reasons would not be awarded men, both by statute and by usual court decision, and although a very few States, such as recently developed in the conservative State of South Carolina, retain the common-law idea that the father must be the head of the family, many States provide that the rights of the parents to the custody and education of their children shall be equal. In other words they are to be brought up by a committee of two. Nevertheless, in California and other code States of the West it is still declared that the husband is the head of the family and may fix the place of abode, and the wife must follow him under penalty of desertion. Such matters are more often determined by custom or by court decision on the common law than by written statute; and it is apprehended that the judges will usually follow the more conservative rule of giving the custody of infant children to the mother, and of more mature children, particularly the boys, to the father.

Divorce statistics on the subject are extremely misleading for two great reasons: First, because in the nature of the case, and perhaps of the American character, in two cases out of three a divorce is granted for fault of the husband.[1] And in the second place, because a false cause is given in a great majority of cases. In England until recently the rule was absolute that a woman could not get a divorce for adultery alone, but there had to be cruelty besides; while the man could be divorced for the first-named cause. No such

[1] *U. S. Labor Bulletin*, Special Reports on Divorce, 1889, 1908.

rule has ever prevailed in any State of this country. Desertion and failure to support, on the other hand, are much more easily proved by the wife. In short, it is not too much to say that in all matters of divorce she stands in a position of advantage.

The same thing is in practice true as to marriage. Under liberal notions, prevailing until recently in all our States, certainly in all where the so-called common-law marriage prevails, it is extremely easy for a woman to prove herself the lawful wife of any man she could prove herself to have known, and sometimes even without proving the acquaintance. The "common-law" marriage, by the way, is not, so far as I can determine, the English common law, nor ever was. If any common law at all, it is the Scotch common law, the English law always having required a ceremony by some priest or at least some magistrate, as does still the law of New England. Under the influence of the State Commissioners for Uniformity of Law this matter has been amended in the State of New York, so that if there be no ceremony there must at least be some written evidence of contract, as in the case of a sale of goods and chattels under the statute of frauds; the contract of marriage being thus, for the first time in New York, made of equal importance with that of the sale of goods to the value of one hundred dollars. Much difference of opinion exists between the South and the North upon this point, the Southern view being more remarkable for chivalry, and the Northern for good sense. Southern members of the National Conference of Commissioners claimed that any such law would result in disaster to many young girls; that if they had to travel ten, twenty, or thirty miles to find a minister or justice of the peace they would in many cases dispense with the formality or be impatient of the delay; and that anyhow on general principles any unmarried man who had seen an unmarried young woman two or three times ought to be engaged to her if he was not. The Northern Commissioners, on the other hand, were de-

sirous of protecting the man, and especially his legitimate widow and children, from the female adventuress, which view the South again characterized as cynical. There is probably something to be said for both sides.

Coming finally to political rights, the subject of women's suffrage alone might well be reserved for a separate chapter, if, indeed, it is to be disposed of by any one mind; but at least the actual occurrences may be stated. As mentioned above in our chapter on political rights, it now exists, by the constitutions of four States; and has been submitted by constitutional amendment in several others and refused. No actual progress, therefore, has been made in fifteen years. As to office-holding, the constitutions of Missouri and Oklahoma—one most conservative, the other most radical—both specify that the governor and members of the legislature must be male. In South Dakota women may hold any office except as otherwise provided by the constitution. In Virginia, by the constitution, they may be notaries public. In all other States, save the four women's-suffrage States, the common law prevails, and they may not hold political office. The first entirely female jury was empanelled in Colorado this year (1910). In some States, however, statutes have been passed opening certain offices, such as notaries public, and, of course, the school commission. Such statutes are, in the writer's opinion, illogical; if women, under a silent constitution, can hold office by statute, they can do it without. It is or is not a constitutional right which the legislature, at least, has no power to give or withhold.

Generally in matters of education they have the same rights both to teach and be taught as males. Indeed, Idaho, Washington, and Wyoming declare that the people have a right to education "without distinction of race, color, caste, or sex," and that is practically the case by the common law of all States, though there is nothing to prevent either co-education or segregation in schools. The recent tendency of custom is certainly in the latter direction, Tufts, Wesleyan,

and other Eastern colleges having given up coeducation after trial, and the principle having been attacked in Chicago, Michigan, and other universities, and by many writers both of fact and fiction.

These are the abstract statements, but one or two matters deserve more particular treatment. First of all, divorce legislation. Many years ago the State Commissioners for Uniformity of Law voted to adhere to the policy of reforming divorce procedure while not attacking the causes. This, again, is too vast a subject to more than summarize here. The causes of divorce vary and have varied all the way from no divorce for any cause in South Carolina, for only one cause in New York and other States, up to twenty or thirty causes, with that indefinite or "omnibus" clause of "mutual incompatibility," or allowing the courts to grant divorces in the interest of the general peace. Since the efforts of reformers have wiped out the express-omnibus clause from the legislation of all States, the same abuse has crept in under the guise of "cruelty"; the national divorce report before referred to showing that the courts of this broad land have held sufficient cruelty to justify divorce (to the wife at least) to exist in tens of thousands of different incidents or causes, ranging all the way from attempts to murder ("breaking plaintiff's nose, fingers, two of her ribs, cut her face and lip, chewed and bitten her ears and face, and wounded her generally from head to foot") to not cutting his toenails [1] or refusing to take the wife to drive in a buggy; indeed, one young North Carolina woman got a divorce from a man she had recently married, on the ground that he was possessed of great wealth, but she had been assured that he was an invalid, and had married him in the hope and belief of his speedy decease, instead of which he proceeded to get cured, which caused her great mental anguish; while one husband at least got a divorce for a missing vest button.[2] But, inde-

[1] *Sic:* "U. S. Labor Commissioners' Report on Marriage and Divorce," Revised Edition, 1889, pp. 174, 175, 176. [2] *Ibid.*, p. 177.

pendent of the vagaries of courts and judges, and perhaps, most of all, of juries in such matters, it has been found that the numbers of divorces bear no particular relation to the number of causes. In fact, many clergymen argue that to have only one cause, adultery, is the worst law of all, as it drives the parties to commit this sin when otherwise they might attain the desired divorce by simple desertion. Moreover, the difference in condition, education, religion, race, and climate is so great throughout the Union that it is unwise, as well as impossible, to get all of our forty-eight States to take the same view on this subject, the Spanish Catholic as the Maine free-thinker, the settler in wild and lonely regions as the inhabitant of the old New England town overpopulated by spinsters. It was, therefore, the opinion of the State Commissioners that the matter of causes was best determined by States, according to their local conditions, and that it would be unwise to attempt, even by amendment to the Constitution, to enforce a national uniformity. All the abuses, substantially, in divorce matters come from procedure, from the carelessness of judges and juries, or, most of all, by laws permitting divorce without proper term of residence, without proper notice to the other side, or by collusion, without proper defence, or for no reason but the obvious intention of contracting other marriages. The recommendations of the Commissioners on Uniformity will, therefore, be found summarized below,[1] and there is beginning to

[1] AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAW OF OTHER STATES RELATIVE TO MIGRATORY DIVORCE

Section 1. No divorce shall be granted for any cause arising prior to the residence of the complainant or defendant in this State, which was not ground for divorce in the State where the cause arose.

Sec. 2. The word "divorce" in this act shall be deemed to mean divorce from the bond of marriage.

Sec. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES RELATIVE TO DIVORCE PROCEDURE AND DIVORCE FROM THE BONDS OF MARRIAGE

Section 1. No person shall be entitled to a divorce for any cause arising in this State who has not had actual residence in this State for at least one

be legislation in the direction of adopting these, or similar statutes. The Supreme Court has vindicated, however, the right of the State not to be compelled under the full faith and credit clause to give effect to divorces improperly obtained in other States by its own citizens or against a defendant who is a citizen. In other words, a marriage, lawful where made, is good everywhere; not so of a divorce. The fact that this ruling, wise and proper, necessarily results in the possibility that a person may be married in one State, divorced in another, and a bachelor in a third, and bigamous in a fourth, lends but an added variety to American life. If the people wish to give the Federal government power to make nation-wide marriage and divorce laws, they must do so by constitutional amendment.

It is always to be remembered that the law of marriage, and divorce as well, was originally administered by the church. Marriage was a *sacrament;* it brought about a *status;* it was not a mere secular contract, as is growing to be more and more the modern view. Indeed, the whole matter of sexual relations was left to the church, and was

year next before bringing suit for divorce, with a *bona-fide* intention of making this State his or her permanent home.

Sec. 2. No person shall be entitled to a divorce for any cause arising out of this State unless the complainant or defendant shall have resided within this State for at least two years next before bringing suit for divorce, with a *bona-fide* intention of making this State his or her permanent home.

Sec. 3. No person shall be entitled to a divorce unless the defendant shall have been personally served with process if within the State, or if without the State, shall have had personal notice, duly proved and appearing of record, or shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court that the complainant does not know the address nor the residence of the defendant and has not been able to ascertain either, after reasonable and due inquiry and search, continued for six months after suit brought, the court or judge in vacation may authorize notice by publication of the pendency of the suit for divorce, to be given in manner provided by law.

Sec. 4. No divorce shall be granted solely upon default nor solely upon admissions by the pleadings, nor except upon hearing before the court in open session.

Sec. 5. After divorce either party may marry again, but in cases where notice has been given by publication only, and the defendant has not appeared, no decree or judgment for divorce shall become final or operative until six months after hearing and decision.

Sec. 6. Wherever the word "divorce" occurs in this act, it shall be deemed to mean divorce from the bond of marriage.

Sec. 7. All acts and parts of acts inconsistent herewith are hereby repealed.

consequently matter of sin and virtue, not of crime and innocence. Modern legislation has, perhaps, too far departed from this distinction. Unquestionably, many matters of which the State now takes jurisdiction were better left to the conscience and to the church, so long as they offend no third party nor the public. Very few lawyers doubt that most of the causes of action based on them, such as the familiar one for alienation of the affections, are only of use to the blackmailer and the adventurer. They are very seldom availed of by honest women.

Nevertheless, it is not questionable that modern American legislation, particularly in the code States, in California, New York, and the West generally, is based upon the view that marriage is a simple contract, whence results the obvious corollary that it may be dissolved at any time by mutual consent. No State has thus far followed the decision to this logical end, on the pretended assumption that the rights of children are concerned; but the rights of children might as well be conserved upon a voluntary divorce as after a scandalous court proceeding. One possible view is that the church should set its own standard, and the state its own standard, even to the extreme of not regulating the matter at all except by ordinary laws of contract and laws for the record of marriages and divorces and for the custody, guardianship, support, and education of children, which would include the presumption of paternity pending an undissolved marriage, but all divorces to be by mutual consent. It is evident to any careful student of our legislation that we would be rapidly approaching this view but for the conservative influence of Massachusetts, Connecticut, Pennsylvania, New Jersey, and the South, and but for the efforts of most of the churches and the divorce reform societies. Which influence will prove more powerful in the end it is not possible to predict.

Socialists urge that the institution of marriage is bound up with that of private property. There is little doubt that the

women's suffrage movement tends to socialism, and, also, paradoxical as it may at first seem, to lax marriage laws and easy divorces. "The single standard of morality" offered by all advanced women's-rights advocates will necessarily be a levelling down, not a levelling up; and in a society where the life of the ordinary young woman *is* that which at least *was* that of the ordinary young man about town, it is hardly likely that there will be any stricter legislation. Where a majority of young women live alone and earn their living, the old order must change.

Divorce, it should be known, is a modern institution; that is, divorce by the secular courts. Such divorce as the Roman Church recognized, or was granted by act of Parliament, was the only divorce existing down to the year 1642, when one Hannah Huish was divorced in Connecticut by the General Court, "with liberty to marry again as God may grant her opportunity," and about that time the Colony of Massachusetts Bay enacted the first law (with the possible exception of one in Geneva) permitting divorces by ordinary courts of law.

The age of consent means two things, or even three, which leads to much confusion. It has a definite meaning in the criminal law, to be discussed later; and then it has a double meaning in the marriage law. First, the age under which the marriage of a girl or boy is absolutely void; second, the age at which it is lawful without the consent of the parents. The tendency of our legislation is to raise the latter age and possibly the former. At least, marriages of very young persons may be absolutely cancelled as if they had never taken place. According to all precedents, human and divine, from the Garden of Eden to Romeo and Juliet, "the age of consent" would by common sense appear to be the age at which the woman did in fact consent; such is the common law, but such is not usually law by our statutes.

But perhaps the legislation of the future is best represented by the extraordinary effort, whose beginning we now see,

to prevent freedom of marriage itself. There is probably no human liberty, no constitutional right to property, or hardly, even, to one's personal freedom, which has been more ardently asserted by all persons not actually slaves (and even, indeed, by them) than the right to love and marry. In the rare instances where even priests have interfered, it has usually led to resentment or resistance. The common law has never dared to.[1] Marriages between near relations, prohibited by the Mosaic law, were invalid by the church law, and became invalid by the secular law at the very late period when it began to have any jurisdiction over the matter, hardly in England half a century ago; in the United States, where we have never had canon law or church courts, the secular law took the Mosaic law from the time of the Massachusetts Body of Liberties (1641). The first interference of statute was the prohibition of the marriage of first cousins. This seems to be increasing. The prohibition of marriage between different races we have mentioned in another chapter. To-day we witness the startling tendency for the States to prescribe whom a person shall *not* marry, even if it do not prescribe whom they shall. The science of eugenics, new-fangled as the word itself, will place upon the statute-book matters and considerations which our forefathers left to the Lord. Considerable progress has already been made in this country. The marriage of insane persons, persons absolutely *non compos*, was, of course, always void at the common law, and the church law as well. They are incapable of contract. The marriage of impotent persons was void also, but by recent laws the marriage of epileptics is forbidden and made void, the marriage of persons addicted to intoxicating liquors or drugs, the marriage of persons who have been infected by certain diseases; and finally, most startling of all, the proposal looms in the future to make every

[1] Mr. Flinders Petrie, in his late book, "Janus in Modern Life," tells us that at least ten varieties of marriage and marriage law have prevailed in history, and that all save marriage by capture perdure in the civilized world to-day, most of them, in actuality, even in England.

man contemplating a marriage submit himself to an examination, both moral and physical, by the State or city officials as to his health and habits, and even that of his ancestry, as bearing upon his posterity. Novels have been written about men who avoided marriage by reason of a taint of insanity in the family; this modern science of eugenics would propose to make such conduct compulsory by law.

We have now said enough on the abstract questions to close with some of the concrete examples. Some States forbid the marriage of a person who has tuberculosis; some require him to submit to an examination. In 1907 a bill was introduced in Michigan, which provided that no person should be permitted to marry who had ever led an unchaste life. This bill did not, however, become a law.

In divorce matters New York, in 1890, adopted the very intelligent statute requiring courts to allow a person charged as corespondent in a divorce case to make defence. Six States raised the age of consent in criminal matters, and four in marriage; one required a marriage ceremony. In 1891 one State added crime, or conviction for crime, as a cause of divorce, one insanity. Two regulated the procedure in the direction recommended by the Uniformity Commissioners. One made it criminal to advertise the securing of divorces in the newspapers. Two States made simple sexual connection a crime (which was not a crime at the common law). One Southern State enacted a special law against slander of women,—another instance of the tendency to their special protection. Several States adopted newer laws giving complete control of their separate property to women, and allowing them to do business as sole traders, without responsibility for the husband's debts. Two more States passed statutes allowing women to practise law. In 1890 one other State forbids drinks to be served by either women or children under eighteen.

In 1893 there was much legislation concerning the powers of the mother over the children, and the liability of the hus-

band to support both wife and children under penalty as for the crime of desertion. This legislation has now become pretty general throughout the country; that is, it is made a criminal offence for a man to desert his wife or children, or, being able, to fail to support them. One State declared the husband and wife joint guardians of the children. In 1894 one State prohibited marriage between first cousins, and one between uncle and niece. One declared that marriage removed nonage. One made it a misdemeanor for a married man to make an offer of marriage. The laws for support of wife and children continue, and there were laws passed giving alimony to the wife, even in case the divorce were for her fault. One State made both husband and wife competent witnesses against each other in either civil or criminal cases. One found it necessary to declare that a woman might practise medicine, and another that she might be a guardian; the statute in both cases would seem to have been unnecessary. Two States provided that she might not serve liquor in saloons or restaurants, the statute already referred to. Louisiana adopted the intelligent statute, already mentioned, permitting the right of suffrage to women in cases of votes on loans or taxes by cities, counties, or towns; and Utah first enacted the much-mooted statute that female school-teachers should be paid like wages as males for the same services. It would be most interesting to hear how this statute, which was passed in 1896, turned out to work.[1] One State provided that women might be masters in chancery, and another carried out the idea of equality by enacting that women should no longer be excepted in the laws against tramps and vagrants. Constitutional amendments proposing women's suffrage were defeated this year (1895) in no less than nine States. Connecticut passed a law that no man or woman should marry who was epileptic or imbecile, if the wife be under forty-five, and another State for the first time awards divorce to the husband

[1] A State official informs me that the law is evaded; see above, p. 212.

for cruelty or indignities suffered at the hands of the wife, while another State still repeals altogether its law permitting divorces for cruelty or intoxication. One other makes insanity a cause of divorce. One other, non-support. Two or three adopt the notion of joint guardianship of children.

In 1897 one State prohibits the remarriage of divorced parties during the life of the innocent plaintiff; the Uniformity of Law Commissioners came to the conclusion that any limitation upon remarriage was unwise and led both to immorality and to wrong against innocent third persons. Divorces should either not be granted at all, or be granted absolutely. This is the better opinion; though, of course, it does not apply to mere orders of separation. Much confusion of thought has arisen upon this subject, the upholders of lax divorces always assuming that the opponents mean to compel persons to live together in misery or incompatibility, which, of course, is far from the case. A legal separation has always been permitted, except, indeed, where that doctrine is interfered with by modern statute; any wife can be freed of a vicious or cruel husband and even compel him to support her while living away from him, but "platform women" are apt to forget this fact. In the same year one Southern State has the chivalry to provide that no women should be worked as convicts on the road; one is not aware but for this that it ever happened. We see more humane legislation about this time for the protection and proper treatment of women in jails or houses of detention, for the services of matrons and the careful separation of the sexes, and by now seats for women in stores or factories are almost universally required. The sale of liquor to women is in one State specially forbidden. Louisiana follows the Texas law giving women tax-payers a vote on appropriations for permanent improvements.

In 1899 comes the law of Michigan, already referred to, forbidding persons with contagious diseases to marry, and compelling physicians to testify. The Massachusetts Medi-

cal Association has gone on record as urging that there should be a privilege to physicians in all cases, as there is to lawyers. Many people believe that to be the common law; such is not the case, even as to priests.

One more State this year awards divorce for insanity, and one more for intoxication. Several States permit women to get damages from liquor-sellers selling intoxicating drink to their husbands; I know of no corresponding statute permitting the husband to get damages for drinks sold the wife. A wife may testify against the husband in certain cases, as actions for alienating of affection, or criminal conversation; not so the husband. Texas and other Southwestern States adopt the statute that an action for seduction shall be suspended on the defendant's marriage with the plaintiff, otherwise it is a felony, and it is again a felony should he after such marriage desert her—the Fourteenth Amendment to the contrary notwithstanding (which reminds one of the colonial Massachusetts statute, that the punishment for that offence may either be imprisonment in the state-prison, or marriage!).

The laws aimed at mere sin increase in number. One State makes improper relations, even by mutual consent, punishable with four years in the state-prison, if the girl be under eighteen. North Dakota introduces a bill to require medical examination in all cases as a prerequisite to marriage; it failed in North Dakota that year, but was promptly introduced in other States. In Oregon all widows and fathers may vote, without regard to property qualification, in school district elections; and this State joins the number of those which forbid the marriage of first cousins.

In 1901 came the great New York statute abolishing the common-law marriage, which we have discussed above. Some States pass laws punishing wife-beating by either imprisonment or a whipping. In 1902 perhaps the most interesting thing is that there is no legislation whatever of any kind on the subject of women's suffrage—showing

distinctly the refluent wave. In 1903 New Hampshire rejects a constitutional amendment for women's suffrage. Kansas restricts the marriage of epileptic and weak-minded persons. Several States reform their divorce laws, and Pennsylvania adopts Southern ideas giving divorce for a previous unchastity discovered after marriage. This matter has so far been covered by no Northern State, though it had been law from all time in Virginia.

In 1904 women's suffrage was proposed in Oregon, and in 1905 rejected. Illinois follows New York in abolishing the common-law marriage, and raises the age to eighteen in a woman and twenty-one in a man. As is often the case, it does not appear from the ambiguous wording of the statute whether this invalidates the marriage or merely subjects the offenders, or the minister or the magistrate, to a penalty; probably the latter. Minnesota forbids the marriage of imbecile or epileptic persons; Nebraska that of first cousins, and Pennsylvania adopts the uniform divorce law recommended by the commissioners. Five other States reform their divorce laws, and four their laws concerning married women's property, and seventeen adopt new laws for compulsory support of the woman and children by the husband.

In 1906 one more State adopts the idea of giving a vote to female property-owners in money elections. One puts the age of consent up to sixteen. In a good many States it is already eighteen. Women's suffrage is again rejected in Oregon; and finally even South Dakota reforms her divorce laws.

Perhaps a word should be given to other laws relating to minors as well as to young women. There is very general legislation throughout the country forbidding the sale of intoxicating liquor to persons under twenty-one, and in the great majority of the States the sale of cigarettes, narcotics or other drugs, or even tobacco, to persons under twenty-one, eighteen, or fifteen, respectively. In some States it is forbidden, or made a misdemeanor, to insure the lives of

children — very important legislation, if necessary. In 1904 Virginia passed a statute punishing kidnapping with death, which is followed in 1905 by heavy penalties for abduction in three other States; fourteen States establish juvenile courts. Seven States make voluntary cohabitation a crime, and six pass what are known as curfew laws. Indeed, it may be generally said that the tendency is, either by State statute or municipal ordinance, to forbid children, or at least girls under sixteen, from being unattended on the streets of a city after a certain hour in the evening.

In 1907 Mississippi makes the age of consent twelve, and the penalty for rape death, which, indeed, is the common law, but which law has extraordinary consequences when the age is raised, as it is in many States, to eighteen. Two more States adopt the laws against abduction and one a statute against blackmail.

Sufficient has, perhaps, been said to give the reader a general view of contemporary law-making on this most important matter of personal relations. Most of the matters mentioned in this chapter are covered by various learned societies in annual reports, or even by the government, in cases of marriage and divorce, and to such special treatises the reader may be referred for more precise information. The Special Report of the United States Census Office, 1909, published early in 1910, makes a careful and elaborate study of the whole question from the years 1867 to 1906. Such statistics are necessarily uncertain for reasons already indicated. Court judgments do not indicate the true cause of divorce, nor is the complainant necessarily the innocent party, nor are the numbers of divorces granted, as for instance in Nevada, any fair indication of the normal divorce rate of the people really living in that State. With this caution we will note that the number of divorces varied from about five hundred in each hundred thousand of married population every year in Washington, Montana, Colorado, Arkansas, Texas, Oregon, Wyoming, Indiana, Idaho, and Oklahoma, down to less than

fifty, or about one-tenth as many, in New Jersey, New York, and Delaware. Certain significant observations may certainly be made upon this table. In the first place, the older States, the old thirteen, have, from the point of view of the conservative or divorce reformer, the best record. At the head stand the three States just named, then North Carolina, Georgia, Pennsylvania, Maryland, Virginia, Massachusetts, Louisiana (largely French and Roman Catholic), and Connecticut—ten of the original thirteen States. Only New Hampshire and Rhode Island, the latter for obvious reasons, stand low down in the column; the last State having about three hundred divorces as against Montana's five hundred. South Carolina, having no divorces at all, does not appear.

The next observation one is compelled to make is that divorces are most numerous in the women's suffrage States, or in the States neighboring, where "women's rights" notions are most prevalent. Montana, Colorado, Wyoming, and Idaho stand second, third, sixth, and eighth, respectively, among the fifty States and Territories comprised in the table.[1] On succeeding pages are graphic maps showing the conditions which in this particular prevail for a number of years. There is little change of these in the thirty years from 1870 to 1900. The Atlantic seaboard and Southern States in 1870 are left white, with the exception of New England, which is slightly shaded; that is, they have less than twenty-five divorces per hundred thousand of inhabitants. In 1880 the black belt States and Territories—having one hundred and over—extends from Wyoming over Montana, Colorado, Utah, and Nevada. In 1900 it covers the entire far West and Southwest, with the exception of New Mexico (Roman Catholic) and Utah (Mormon). The chart showing the relation of divorces to number of married population does not materially differ. Now these figures, ranging from five hundred divorces per hundred thousand married population per year, or three hundred in the more lax States, down to less

[1] Census Reports, 1909, "Marriage and Divorce," part I, p. 15.

than fifty in the stricter States, compare with other countries as follows:

Only Japan shows a number of divorces approaching these figures. She has two hundred and fifteen per one hundred thousand of general population,—about the same as Indiana, which stands eighth in the order of States. But with the exception of Japan no civilized country shows anything like the proportion of divorces that the American States do. Thus, in Great Britain and Ireland there are but two per hundred thousand of population; in Scotland, four; in the German Empire, fifteen; in France, twenty-three, and in the highest country of all, Switzerland, thirty-two, while the average of the entire United States is seventy-three.

The census figures as to the trades or professions in which divorce is most prevalent are amusing, but probably not very significant. It appears, as might be expected, that actors and actresses stand at the head, and next musicians or teachers of music; while clergymen stand very near the bottom of the list, only excelled in this good record by bar-tenders (in Rhode Island) and, throughout the country, by agricultural laborers.

But after all, more important, perhaps, than even marriage and divorce, are the great social changes which arise from the general engaging of women in industrial occupation. In matters of property right we have found they are substantially already on an equality with men, if not in a position of special privilege. Yet, as Herbert Spencer remarked, "When an abuse which has existed for many centuries is at last on the point of disappearing, the most violent outcry is made against it." During the century when women were really oppressed,[1] under the power of the husband, given no rights as to their property, their children, or hardly even as to their person, no complaint was heard. Whereas to-day

[1] In the trial of Mary Moders for bigamy (2 State Trials, 498) as late as 1663 the chief justice said, "If guilty, she must die; a woman hath no clergy." Yet Mary wrote to her husband, in court, "Nay, my lord, 'tis not amiss, before we part, to have a kiss!" She was acquitted.

the cry of unjust legislation almost rises to a shriek. The movement for the emancipation of women originated, of course, with Mary Wolstonecraft, about 1812. Her book, which was the first, is certainly one of the longest that have yet been written on the subject. It remained at the time unanswered, and when its author married Godwin she herself seems to have lost interest in the controversy. Nevertheless, little has been added since to the ideas there put forward, save, indeed, for the vote. It is a somewhat curious fact that in all Miss Wolstonecraft's great magazine of grievances and demands for remedying legislation, there is not a single word said about votes by women, or there being such a thing as the right to the ballot.

The industrial condition of the sex in American cities may be summed up with the general phrase "absolute equality of opportunity," with a certain amount of special protection. Women are nearly universally required to be given seats in factories and stores, and the laws specially protecting their periods of employment have just been sustained as constitutional in the States of Illinois and Oregon and the Supreme Court of the United States. On the other hand, we are far behind European countries in legislation to protect their health or sanitary conditions. The most radical effort at legislation ever made was undoubtedly that Connecticut bill forbidding employment of married women in factories, which, however, did not become a law. The recent reports of Laura Scott to the American Association for Labor Legislation, on Child Labor, 1910, and the Employment of Women, 1909, have already been referred to. From the former, which appeared as we are going to press, we learn that there are prohibited occupations to children in all the States without exception—a statement which certainly would not have been true some years since. These prohibited groups of employment are generally, to male and female, dangerous machinery and mines, and to females also saloons; and there is nearly universally a limitation of all labor to

above the age of twelve or fourteen for all purposes, and to above fourteen or sixteen for educational purposes, besides which there is a very general prohibition of acrobatic or theatrical performances. Girls are sometimes forbidden to sell newspapers or deliver messages for telegraph companies or others. Compulsory education is, of course, universal, and the machinery to bring it about is generally based upon a system of certificates or cards, with truant officers and factory inspectors.

According to the encyclopædias, some five hundred thousand women were employed in England about twenty years ago, of whom about three hundred thousand were in the textile mills. In Massachusetts alone there were two hundred and eight thousand women employed, according to the last State census. Neither of these figures include the vast class of domestic service and farm labor. The inclusion of this would swell the proportion of adult women employed in gainful occupations to at least one in four, if not one in three. Congress itself has recently been investigating the question whether "home life has been threatened, marriage decreased, divorce increased out of all proportion, and the birth rate now barely exceeds the death rate, so that the economic and social welfare of the country is menaced by this army of female wage earners" (see *Boston Herald*, April 2, 1908). It appeared that in 1900 one million seven hundred and fifty thousand children were at work between the ages of ten and fifteen, of whom five hundred thousand were girls. This and other considerations have led to the movement for national child-labor laws already discussed.

Perhaps the most dangerous tendency, at least to conservative ideas, is the increasing one to take the children away from the custody of the parents, or even of the mother, and place them in State institutions. Indeed, in some Western States it would appear that the general disapproval of the neighbors of the method employed by parents in bringing up, nurturing, educating, or controlling their children, is sufficient cause

for the State authorities to step in and disrupt the family by removing the children, even when themselves unwilling, from the home to some State or county institution. Any one who has worked much in public charities and had experience with that woeful creature, the institutionalized child, will realize the menace contained in such legislation.

Finally, it should be remembered that throughout the United States men are universally liable for their wives' debts, short of some quasi-legal separation; on the other hand, wives are never liable for the debts of their husbands.

XVIII

CRIMINAL LAW AND POLICE

There is no very general tendency toward new legislation in matters of felony, and many States are still content to remain with the common law. Such legislation as there is is mainly concerned with the protection of women and children, alluded to in the last chapter. In matters of less serious offences, of legislation creating misdemeanors or merely declaring certain acts unlawful, there are three main lines: First, legislation usually expressive of the common law against conspiracies of all sorts, combinations both of individuals and of capital, already fully discussed. Next, the general line of legislation in the interest of the health of the public, such as pure food and drug laws, and examination for trade or professional licenses; and finally laws protecting the individual against himself, such as liquor and anti-cigarette or anti-cocaine laws. It is hardly necessary to more than illustrate some of these matters. Then there are the laws regulating punishment for crime, laws for probation or parole, indeterminate sentences, etc., all based on the modern theory that reform, not retribution or even prevention, is the basis of penology. Such laws have been held constitutional, even when their result is to arbitrarily increase a man's sentence for crime on account of his past or subsequent conduct. Finally, and most important, there is the legislation regulating the actual trial of cases, indictments, juries, appeals,—the law of court procedure, civil as well as criminal, which for convenience we may consider in this chapter.

Of the first sort of legislation, we have noted that in many States adultery, in many States simple drunkenness, in other

States mere single acts of immorality, are made felonies. In 1892 the State laws against food adulteration begin, which, by 1910, have covered milk, butter, maple sugar, and many other subjects. By the Federal pure-food law of 1906, applying to interstate commerce in such articles, it became advisable for the States to adopt the Federal Act as a State law; also for the sake of uniformity a few States have had the intelligence to do so. The trades of fat-rendering and bone-boiling are made nuisances by statute.

In 1896 we note the first statutes against lynching. In 1897 local option prevails in Texas, and the blue laws of Connecticut are abolished to the extent that recreation on Sundays is no longer prohibited. Local option and anti-lynching laws continue during the next two or three years, and by 1900 twenty-four States have pure-food laws, which, however, are ineffective because they impose no sufficient penalty. In 1903, in consequence of the assassination of President McKinley, Washington and Wisconsin make the advocating anarchy a felony. Twenty-one more States pass pure-food laws, and nearly all the States have gone over to local option from State-wide prohibition, to which latter principle only three States now adhere. In 1904 Mississippi and Virginia adopt more stringent laws against vagrancy, and 1905 is the year of active legislation on the indeterminate sentence, juvenile courts, parole and probation, with two more statutes against mobs and lynching. In 1907 the States are busied with the attempt to enforce their prohibition regulations against the interstate commerce jurisdiction of the Federal government. Solicitation of interstate orders for liquor is forbidden in Mississippi, and it is provided that shipments sent C. O. D. are not to be moved one hundred feet or given away; also, that the mere possession of an internal revenue receipt from the United States government is *prima facie* evidence of an offence against the State law. Statutes of this kind led to renewed conflict between State and Federal authority. Virginia adopts the statute against

giving tips or any commissions; see p. 244 above. In 1908 we find more parole and probation laws, two prohibition and three local-option laws, and four new pure-food statutes.

Coming to matters of court procedure, in 1890 one State provides that there should never be called more than six witnesses for each side in any criminal case, which oddly reminds one of early English trials by compurgation; but is, of course, quite unconstitutional in this country. In 1893 Connecticut adopts a statute that honorably discharged soldiers and sailors addicted to drink are to be "treated" free at the State hospital. The definition of the word "treated" seems ambiguous, but in any event it is a pleasing reminder of Bishop Berkeley's remark that he would "rather see England free than England sober." Some States provide for a jury of eight in criminal cases and for a verdict of three-quarters in civil cases—a statute of questionable constitutionality. Very generally throughout the twenty years studied by us, the States have adopted stricter rules for the admission of attorneys at law to practise at the bar.

In 1895 Pennsylvania yields to the physicians and passes a statute forbidding them to disclose communications of patients, but the statute only applies to civil cases. More States provide for verdicts by a majority of the jury. Maryland goes Pennsylvania one better in extending the professional privilege to newspaper reporters; that is to say, we find a statute that they may not be compelled to disclose their sources of information, an excellent statute for the yellow journal. In 1897 California abolishes capital punishment; there has been a general tendency in this direction, of recent years, although some States, having tried the experiment, have returned to it again, as has the Republic of France. In 1899 the privilege from testifying is extended in one State also to trained nurses, and in others to physicians, even in criminal cases, although they may testify with the patient's consent. The same law was adopted in Iowa in 1900. Ohio does away with the common law of libel, except the plain-

tiff can prove actual malice. By this year, seventeen States expressly allow women to practise law, and twenty-eight do so by implication. The Colorado statute for a three-fourths verdict is held unconstitutional.

The regulation of the liquor traffic is, perhaps, after the labor question, the most universal subject of legislation in occidental nations. Experts on the matter tell us (E. L. Fanshawe, "Liquor Legislation in the United States and Canada," Report to Parliament, 1892) that there have hitherto been but three, or possibly four, inventions—universal or State-wide prohibition, local option, license, high or low, and State administration. The last was recently tried in South Carolina with more or less success. Prohibition by a general law does not seem to be effective; local option, on the contrary, does seem to be so. But the general consensus of opinion, to which Mr. Fanshawe comes, and which seems still to be held by most intelligent American publicists, is that on the whole high license works best, and this the women themselves have just voted in Denver; not only because it actually prohibits to a certain extent, but it regulates and polices the traffic, prevents the sale of adulterated liquor, and to a considerable extent the grosser disorders and political dangers that attend the bar-room. On the other hand, the power of licensing should never be granted to any political body, but should be granted under fixed rules (determined by geographical position and the local opposition or desire) by the local government. These rules should not be arbitrary, and the person applying for license should have the right to appeal to some court.

Matters of bribery and political corruption have been somewhat anticipated under Chapter 14. Suffice it here to say that the States very generally have been adopting statutes making bribery criminal and a cause of permanent disqualification from all political right, either voting or holding office, and this applies both to the person bribing and the person receiving the bribe. Bribery by offers or

promise of employment is a far more difficult matter, but this matter also certain States have sought to regulate.

There are, of course, thousands and thousands of city ordinances relating to the criminal law, but usually to minor offences or matters of police regulation. Undoubtedly the duplication of them tends to make us not a law-abiding community. It was the present Boston police commissioner who complained that there were more than eleven thousand ordinances in Boston, which everybody was supposed to know. We must let the whole matter go by saying that there is a general attempt at universal police regulation of all the actions of life, at least such as are conducted outside of a man's own house. Sunday laws, Sabbatarian legislation, have, of course, very largely been abandoned, except when restored in the interest, or supposed interest, of labor. In the State of New York, for instance, barbers could only shave on Sunday in the city of New York and the town of Saratoga; the reasons for the exception are obvious.

Coming to general principles of penology, there is no doubt that of the three possible theories, revenge, prevention, and reform of the criminal, it is the latter that in the main prevails throughout the United States. An investigation was conducted some years since by correspondence with a vast number of judges throughout the world, and it proved that this was also their principle of imposing sentences, in the majority of cases. More radical change is found in that legislation freeing prisoners on parole, providing indeterminate sentences, and in the creation of special courts for boys and young women, with special gaols and reformatories. Jury trial, of course, remains substantially unchanged from the earlier times, only that the jurors are now in most States permitted to read or to have read the newspapers, and that the government has a right of appeal when the verdict has gone for the prisoner on a point of law. This matter, upon President Roosevelt's recommendation, was embodied in an act of Congress.

The legislation making it criminal to advocate assassination or anarchism has been adverted to when we were considering the rights of aliens. In England, it is treason to imagine the death of the king. There is no constitutional reason why it should not be treason to imagine the death of the president, or perhaps even the subversion by force of organized society. Such laws have been passed in Washington, Wisconsin, and other States.

It has, in some States, been made a capital offence to kidnap a child, and, as has been elsewhere said, the rigor of the common law is very generally preserved for the crime of rape. The most active effort to-day for legislation in matters quasi-criminal is that to extend jury trial over cases of contempt of court, particularly when in violation of a chancery injunction when the act itself is criminal. The greatest need of criminal legislation is in the writer's opinion in matters of business or corporate fraud, and in revival of our older English law against the extortion or regrating of middlemen, the engrossing of markets, the artificial enhancing of the prices of the necessaries of life, and the withholding, destruction, or improper preservation of food. But most of all, as President Taft has urged, greater speed and certainty and less technicality in court trials for crime—a reform of our legal procedure.

XIX

OF THE GOVERNMENTAL FUNCTION, INTERNAL IMPROVEMENTS, AND THE PUBLIC DOMAIN

The matter of most interest in modern American legislation for municipal government is probably the home-rule principle. That is, statutes permitting cities or towns, or even villages, to draw and adopt their own charters and govern themselves in their own way. The charter thus adopted may, of course, be the old-fashioned government of mayor, aldermen, common council, etc., or it may be the newly invented government by commission, based substantially on the theory of permanent officials chosen at infrequent intervals, and officers, in so far as possible, appointed, and not elected. The one makes for efficiency, the other for democracy. At present the American people seem to have a craze for efficiency, even at the expense of representative government, and of principles hitherto thought constitutional. It is impossible to tell how long it will last. It may carry us into the extreme of personal government, national, State, and local, or history may repeat itself and we may return to the principle of frequent elections and direct responsibility to the voters under the arbitrament of the courts of law. We may go on to special courts (declared odious in the Great Case of Monopolies) and administrative law, or be content with improved understanding of the law we already have.

These matters are too large for us; coming down to more concrete facts, we find that the general tendencies of legislation upon State, and particularly municipal, government are to somewhat enlarge its functions, but considerably to limit

its expenditure. Greater distrust is shown in legislatures, municipal as well as State, and a greater trust and power reposed in individual heads, and a much greater power intrusted to more or less permanent boards and commissions, usually not elective, and often clothed with vast powers not expressly submitted to the scrutiny of courts of law. The purposes of education are somewhat extended, generally in the direction of better education, more technical and practical and less "classical." [1] Charity includes a largely increased recreation for the people, State provision for many more classes of the invalid and incompetent, specialized homes for various sorts of infirm or inebriate, and some little charity in the guise of bounties of seed, etc., to needy farmers, which latter, however, have usually been held unconstitutional.

Thus, in 1890 North Dakota limits the debt of cities to five per cent.; but permits county loans to raise seed grain for needy farmers; other States extend the principle of socialism to electric lighting, gas, natural gas, water, sewers, agricultural drainage, irrigation, turnpikes, and cemeteries. That is to say, all may be built, maintained, or run at the municipal expense, or under municipal control. In 1895 Wisconsin, North Carolina, Texas, and other States carefully limit State, county, town, or city taxes to prescribed rates. Texas requires a two-thirds vote on the issue of municipal bonds, and fixes the debt limit at five per cent. In 1896 Missouri rejects a constitutional amendment permitting municipal gas and water socialism on majority vote of the voters. The same year the failure of such enterprises begins to show itself in a statute of Iowa authorizing municipal plants to be sold upon a popular vote. The socialist town of Hamilton, Ohio, actually went into the hands of a receiver; a similar result followed the English experiments in the towns of Poplar and West Ham.

[1] Though a lady orator in Boston this year complains to an audience of labor unionists that trades schools and industrial education tend to "peasantize" the poor. Peasanthood was the condition of the agricultural laborer; it was skil ed labor that made him free—neither peasant, peon, nor villein. See p. 20, above.

In 1897 many other States adopted a limit for State, city, county, or town taxes. Indeed, it may be stated generally, without going into further details, that such laws are practically universal throughout the South and West, and prevail to some extent as to cities only in New England, and the same may be said of laws fixing a debt limit which States, counties, cities, or towns may not exceed. Such laws are very generally evaded, as by leasing desired improvements of a private company, or (in Indiana at least) the overlapping of municipal districts; thus there may be (as formerly in England) city, town, school district or poor district, each separate and not conterminous.

While it is obvious that municipal socialism has rather decreased in the last ten years, laws restricting the granting of franchises have become far more intelligent and are being generally adopted. The best example of such legislation is probably to be found in Kansas. The general principles are that no franchise can be given but for a limited time, that it must be bought at public auction, that the earnings beyond a certain percentage on investment must revert to the city, and that there must be a referendum to popular vote in the locality interested. In 1899 Michigan declares the municipal ownership of street railways unconstitutional, but Nevada passes a statute for municipal ownership of telephone lines. In 1903 the municipal ownership of gas and oil wells is permitted in Kansas, and of coal or fuel yards in Maine. A law similar to the latter was declared unconstitutional by the Massachusetts Supreme Court. Missouri adopts a sweeping statute for the municipal ownership of "any public utilities" in cities of less than thirty thousand population. In 1904 Louisiana permits small towns to own and operate street railways. Other States copy the Missouri statute as to municipal ownership of all or any public utilities, and generally the principle is extended, but only in a permissive way; that is to say, upon majority vote, and this seems to be the present

tendency. The most striking present experiment is in Milwaukee; both Haverhill and Brockton tried socialistic city government in Massachusetts, but abandoned it.

Civil-service reform has very generally made progress during the past twenty years in State and city governments, and probably the principle is now more or less recognized in a great majority of the States.

Comparatively little is to be said as to internal improvements. The Michigan Constitution provides that the State shall go into no internal improvement whatever, and this, of course, was the older principle without any express constitutional provision. North Dakota and Wyoming provide that the State cannot be interested in works of internal improvement except upon two-thirds vote of the people. South Dakota also provides that the State may not engage in them in any case; Alabama, that it may not loan its credit in support of such works; and Maryland Minnesota, and Wisconsin, that it may not contract debts for the same, or in Kansas be a party to carrying them on. In Virginia, no county, city, or town may engage in any work of internal improvement except roads. Many of the States, however, specify a considerable number of purposes for which State, cities, or counties may give or loan their credit; and the matter of municipal socialism has just been discussed.

Very generally, the States have created agricultural experiment stations and model farms, drainage districts in the South, a levee system on the Mississippi River, and irrigation districts in the West; artesian wells in Texas, and in several States, State dairy bureaus. In specialized products, such as beet sugar, there is often provision for a State agricultural bureau, and nearly always for general agricultural as well as industrial instruction. The States are only beginning to adopt State forests, or forest reserves, Massachusetts and New York leading the way. Forestry commissions exist in a few States, but the very slightest beginning has been made

at forestry laws. No control is as yet exercised over reforestation or replanting; a few of the Western States exempt growing trees, or the land covered by growing trees, from more than a nominal tax, notably Indiana and Nebraska. The forestry laws are, however, increasing. In 1903 we find one, in 1904 five, and in 1905 six, with the tree bounty law in North Dakota, and two States exempting forest lands from taxes. There are four statutes this year for fish or game preserves. In 1907 four States create forestry boards, and two exempt forests from taxation, and in 1908 growing trees are exempted in Massachusetts and Rhode Island. But under the unlimited power of Congress over Federal territory not yet incorporated into States, or not ceded to the State when incorporated, it is to the Federal government that we have looked for the creation and preservation of parks, forest reserves, and natural reserves generally. How far it may constitutionally create such within the lines of old States, or on land of which it is otherwise incapable of ownership, is a constitutional question still undecided.

The educational functions of the State are, of course, a peculiar principle of American civilization. Nearly all State constitutions provide that education is a natural right, and the first common school supported by general taxation appears in the Colony of Massachusetts Bay before the year 1640. The principle of compulsory education exists throughout all the States, and in all education of the most diversified kind is given, from the primary school or kindergarten to the State university or technical school of applied science, trade, or business. Nearly all the States have established State universities which are free or open at a nominal charge. Massachusetts continues to rely upon a semi-private institution, Harvard University, which, indeed, is expressly mentioned in its constitution. Provision is universally made also for evening schools, for industrial schools, for public libraries, and for popular elections, and besides the ordinary educational laws and the truant laws,

there is in the statutes concerning labor matters abundant machinery for requiring some education as a preliminary to any employment. The age of compulsory education may be said to average between the ages of eight and fifteen, though the limits are extended either way in the divers States. Farm schools and industrial reform schools generally exist, both as a part of the present system and of the educational department. Coeducation in State schools and colleges is almost universal. On the other hand, as we have shown, the segregation of the races is in some States insisted upon. Several States forbid the employment of teachers under the age of sixteen, or even eighteen. Free text-books are generally provided. The period of compulsory schooling varies from the classic twelve weeks in the winter, as in old New England, to substantially the full academic year. Textile and other manual training schools exist in some States, but have generally evoked the opposition of organized labor, and are more usually created by private endowment. The tendency of civil service reform legislation, furthermore, has been to require a certain minimum of education, though it may be feared that the forecast of De Tocqueville remains justified; our national educational weakness is our failure to provide for a "serious higher instruction."

The great question of taxation we may only mention here by way of exclusion. It is naturally a matter for treatment by itself. The reader will remember (see chapter VII) that nearly all the States have now inheritance taxes besides direct property taxes, and many of them have income taxes and, in the South particularly, license taxes, or taxes upon trades or callings. They all tax corporations, nearly always by an excise tax on the franchise or stock, distinct from the property tax or the tax upon earnings. In both corporation taxes and inheritance taxes they are likely to find themselves in conflict with the Federal government, or at least to have duplicate systems taxing the same subjects, as, indeed, already considerable injustice is caused by inheritance taxes imposed

in full in each State upon the stock of corporations lying in more than one State. In such cases the tax should, of course, be proportionate.

The principle of graded taxation in the matter of incomes and succession taxes has been very generally adopted, not as yet in any direct property tax, except that a small amount of property, one hundred dollars or five hundred dollars, is usually exempt.

The principle of imposing taxation not for revenue, but for some ulterior or ethical purpose, such as the destruction of swollen fortunes, is liable to constitutional objection in this country, though the courts may not look behind the tax to the motive, unless the latter is expressed upon the face. For this reason, the present corporation tax, on its surface, is imposed solely for the purpose of raising revenue, though in debate in Congress it was advocated mainly for the object of bringing large corporations under Federal examination and control.

The last matter relating to taxation, that of bounties, we have discussed in chapter VII also. State aid bonds, or bonds of counties, cities, and towns, issued to encourage industries, raise a question far more complex than the simple bounty. Such legislation has, however, practically ceased throughout the country, except in the form of exemption from taxation. It has been recognized by a long line of decisions that it is constitutional to grant such aid to railroads, but it may be questioned in almost any other industry. A mere exemption from taxation, especially for a certain number of years, rests on a stronger constitutional basis. Many of the Southern States have recently passed laws exempting manufacturing corporations, etc., from taxation for a definite number of years, and such provisions are found in one or two State constitutions. When they only rest upon a statute, however, they are always at least litigable at the suit of any tax-payer. So, bonds issued by the city of Boston under a statute expressly authorizing them to enable land-owners to

rebuild after the great fire, were held to be void. A Federal loan was proposed to raise money to lend to the inhabitants of San Francisco to rebuild after the earthquake, but failed of enactment. It will be remembered that the States have very generally no power to engage in internal improvements (see above). *A fortiori*, therefore, they can hardly loan money or credit to private interests be they never so much for the general benefit. The difficulty of testing all such laws has been adverted to, at least in the case of taxation. For that purpose Massachusetts has a wise law providing machinery by which such matters may be contested upon the action of any ten tax-payers.

There are three great questions before us in the immediate future—the negro, local or self government, and taxation, which last is the chief problem of city and town government.

The world has never before tried the experiment of municipal government, where those who have the local vote do not generally pay the local taxes.

XX

FINAL

One would suppose that a democracy which believes in the absolute panacea of law-making would take particular pains with the forms of its legislation, to have its statutes clear, in good English, not contradictory, properly expressed and properly authenticated. You would certainly suppose that the people who believe that everything should be done under a written law would take the greatest pains to see that law was *official;* also, that it was clear, so as to be "understanded of the people"; also, that it did not contain a thousand contradictions and uncertainties. When our—I will not say wiser, but certainly better educated—forefathers met in national convention to adopt a constitution, one of the first things they did was to appoint a "Committee on Style." It is needless to say that no such committee exists in any American legislature. You would suppose they would take pains to see that all the laws were printed in one or more books where the people could find them. This is not the case in New York or in many of our greater States. You would also suppose that when they passed another law on the same subject they would say how much of the former law they meant to repeal, but in many States that also is not done. It would probably be too much to hope that they should not confuse the subject with a new law on a matter already completely covered; but the form of their legislation should be improved at least in the first three particulars I have mentioned.

What is the fact? The secretary of one new State reports that the laws, as served up to him by the legislature, are "so full of contradictions, omissions, repetitions, bad grammar, and bad spelling" that it has been impossible for him to print them and make any sense; the bad grammar and the bad spelling, at least, he has, therefore, presumed to correct. But what should surprise us still more is, that in very few of our States is there any authentic edition of the laws whatever, and quite a number do not publish their constitutions!

The worst condition of all is found in the national legislation of Congress, until very recently in the great State of New York, and in those States which have adopted the code system generally. I do not say this as an opponent of general codes, but I am constrained to note as a fact that those States are the ones which have their legislation in the worst shape of any. The charm of the statute theory is that the half-educated lawyer or layman supposes he can find all the laws written in one book. Abraham Lincoln even is said to have had the major part of his "shelf of best books" composed of an old copy of the statutes of Indiana, though I can find no traces of such reading in the style of his Gettysburg address. But how far is this democratic claim that the laws of a State are all contained in one book borne out by the facts?

Of our fifty States and Territories only Alabama, Arizona, the District of Columbia, Connecticut, Delaware, Maine, Maryland, Massachusetts, Montana, New Hampshire, New York (partially), North Carolina, Rhode Island, South Carolina, Vermont, and Wisconsin (sixteen States) have any official revision or "General Laws"; that is to say, one or more volumes containing the complete mass of legislation, up to the time of their issue, formally enacted by the legislature. A number of other States have what are called "authorized revisions" or authorized editions of the law. This phrase I use to mean a codification by one or more men (usually a commission of three) who are duly appointed for the purpose, under a

valid act of the State legislature, but whose compilation, when made, is never in form adopted by the legislature itself. Leaving out the constitutional question whether such a book is in any sense law at all—for in all probability no legislature can delegate to any three gentlemen the power to make laws, even one law, much more all the laws of the State—leaving out the constitutional question, it is very doubtful how far such compilations are reliable, although printed in a book said to be authorized and official, and held out to the public as such. That is to say, if the real law, as originally enacted, differs in any sense or meaning from the law as set forth in this so-called "authorized publication," the latter will have no validity. Indeed, some States say this expressly. They provide that these compilations, although authorized, are only admissible *in evidence* of what the statutes of the State really are—that is to say, only valid if uncontradicted. It was impossible to correspond with all the States upon this point —if, indeed, I could have got opinions from their respective supreme courts, for no other opinion would be of any value. The compilation of the State of Arkansas says, somewhere near its title-page, that it is "approved by Sam W. Williams." It does not appear who Sam W. Williams is, what authority he had to approve it, or whether his approval gave to the laws contained in that bulky volume any increased validity. This is a typical example of the "authorized" revision, and this is the state of things that exists in such important States as Arkansas, California, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, Tennessee, Utah, Virginia, and Wyoming (twenty in all).

Before leaving these States, which do have some form of "revised statutes" or complete code—and be it remembered that I am never here speaking of annual laws, for however bad their form and the form of their publication, they are usually, at least, *official*—it will be interesting, and, I think, throw further light on the subject, to cull some passages from

the laws of States having such "authorized revisions," to show how far their real authority extends. The general statutes of 1897 of the State of Kentucky say on their title-page that they are an authorized compilation approved by the Supreme Court, but the form of approval of the Supreme Court of Kentucky runs as follows: "Although we consider this duty not lawfully imposed upon us," they say that, so far as they have observed, they "detect no errors in the compilation and it seems to have been properly done." Of how much value such approval would be in case there turned out to be a discrepancy between the compilation and the original statute, I leave to the lawyers to judge. The compiled laws of New Mexico of the same year, made by the solicitor-general, contain an amusing statement under his own signature, that he believes "a large part of the laws he there prints are either obsolete or have actually been repealed by certain later statutes," but he, as it were, shovels them in, in the hope that some of them may be good!

The commissioners of the State of North Dakota go still farther. Their code of 1895 bears a statement that it is, by authority of law, "brought to date" by the commissioners, who go on to say that they have compared the codes of other States and have added and incorporated many other laws taken from such codes of other States, apparently because the commissioners thought them of value! One must really ask any first-year student of constitutional legislation what he thinks of that statement, not only of its constitutionality, but of its audacity. Finally, the State of South Dakota says, in its statutes of 1899, what I quoted at the beginning—that "all the laws contained in the book are to be considered as admissible in evidence," but not conclusive of their own authenticity or correct statement.

We now come to the third, and, from the point of view of the believer in statutes, probably the worst class of all. That is to say, States which have no official or authorized compilation whatever and which rely entirely upon the enter-

prise of money-making publishers to make a book which correctly prints the laws, and all the laws, of the State in question. For one State, at least, such a compilation was made by a few industrious newspaper correspondents at Washington! The States and Territories that are in this cheerful condition are, as I have said: New York (in part) the Territory of Alaska, California, Colorado, Illinois, Indiana—that is to say, there has been no official revision since 1881 and everybody, in fact, uses a privately prepared digest—Louisiana, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania, Washington, and West Virginia (fourteen in all). Besides this, there are other States such as Wisconsin and Indiana, already mentioned, where there is no official *recent* revision, so that everybody depends upon a private compilation, which is the only one procurable.

So much for the authenticity of the books themselves which contain the laws upon which we all have to depend. Now, coming to the form of the laws. As I have already remarked, there is no committee on style. There is no attempt whatever made at scientific drafting. To give an example of what difference this may make in mere convenience, it is only a few weeks since, in Massachusetts, a chapter of law to protect the public against personal injuries caused by insolvent railway and street railway companies was drawn up by a good lawyer, and contained between twenty and thirty sections, or about three pages of print. It was brought to another lawyer, certainly no better lawyer, but a legislative expert, who got all that was desired into one section of five lines. There is no committee on style, there is no expert drafting. The case of the recent Massachusetts statute declaring the common law to be the common law, and therefore jeopardizing the very object of the statute, will not be forgotten see p. 188 above). There are certain definite recommendations I should like to make.

First, adopt the provision that "no statute shall be regarded as repealed unless mentioned as repealed, and when a law is

amended, the whole law shall be printed as amended in full." This would acquaint the legislature with the law already existing, before they proceed to change it. Next provide that all laws shall be printed and published by a *State* publisher and the authenticity of all revisions be duly guaranteed by their being submitted to the legislature and reenacted *en bloc*, as is our practice with revisions in Massachusetts and some as other States. Third, the local or private acts should be separated from the public laws, and they might advantageously even be printed in a separate volume, as is done in some States already. But who shall determine whether it is a private, local or special act, or a general law? I can only answer that that must be left to the legislature until we adopt the system strongly to be recommended of a permanent, preliminary, expert draftsman. Finally, no legislation must ever be *absolutely* delegated. That is to say, even if a revision is drawn up by an authorized commission, their work should be afterward ratified by the legislature. It is said, I think, that the constitution of Virginia, drawn up by a constitutional convention, was never ratified by the people. If so, there is a grave constitutional doubt whether it or any part of it may not be repealed at any time by a simple statute. But can a constituent body of the mass of the people, the fundamental and original political entity of the Anglo-Saxon world, be forbidden from delegating its legislative power, as its representatives themselves are forbidden?

The last matter, that of arrangement, order of printing, and form of title, is so directly connected with that of indexing that I shall treat the two things together. Now, there are three different methods of arrangement, or lack of arrangement, to be found in printing the laws of our forty-six States and four Territories, both in the revisions and in the annual laws. The revisions, however, are more apt to have a *topical* arrangement, and to be divided into chapters, with titles, each containing a special subject and arranged, either topi-

cally, or, in some States, even so intelligent otherwise as are Pennsylvania and New Jersey, arranged with the elementary stupidity of the alphabetical system. I say, stupid; when, for instance, you have a chapter on "Corporations," no one can tell whether the legislature or compilers are going to put it under "C" for corporations, under "I" for incorporations, or under "J" for joint-stock companies. The alphabetical system of arrangement is the most contemptible of all, and should be relegated to a limbo at once. The annual laws, of course, are much less likely to have any arrangement whatever. Passed chronologically, they are more apt to follow in the order of their passage.

Now these systems as we find them are as follows: in nearly all States public and private laws are lumped together, although in a few they are indexed separately. Most of the States to-day, including all the "code" States, adopt the topical system of arrangement, as, indeed, must be the case in anything that might, by any possibility, be called a code, and even a general "revision" of the statutes will naturally fall into chapters covering certain subjects. A few States, as I have said, cling to the crude alphabetical system, and quite a number have no discernible system whatever. In some States the annual laws are arranged by number, in some by date of passage, and in some apparently according to the sweet will of the printer. In those States which do not arrange them or entitle them by date of passage we have to depend on the crude and dangerous system of citation by page. Acts of Congress are sometimes cited by date of passage, sometimes more formally by volume and number of the Statutes at Large, and more often than either, probably, by the popular name of the statute, such as the "Sherman Act," the "Hepburn Act," or the "Interstate Commerce Law."

It seems to me we should recommend one system. That for the codes or general revisions should certainly be topical. That of the annual laws may either be topical or chronological,

but the statutes, in whatever order they are printed, should be *numbered* and cited by number. No alphabetical arrangement ever should be permitted.

As to indexing we should urge upon State legislatures, secretaries of State, and official draftsmen (when we get any) that the very excellent system contained in the New York Year Book of Legislation should be adopted for all volumes of State laws. It is as bad for the index to be too big as to be too little, and it does not follow that the good draftsman is a good indexer. The index to our Revised Laws of Massachusetts is contained in one large separate volume of 570 double-column pages. To look for a statute in the index is just about as bad as to look for it in the revision itself. The most important point of all is the proper choice of subject titles. Laws should be indexed under the general subject or branch of the science of jurisprudence, or the subject-matter to which they belong, not too technically and not too much according to mere logic. For example, any lawyer or any student of civics who wished to learn about the labor laws of a State, whether, for instance, it had a nine-hour law or not, would look in the index under the head of "Labor." *Labor* has become, for all our minds, the general head under which that great and important mass of legislation concerning the relation of all employers and employees, and the condition and treatment of mechanical or other labor, naturally falls. But if you search in our elaborate index of Massachusetts for the head of "*Labor*" you will not find it. If you look under "*Employment of Labor*" you will find it, but you cannot be certain that you will find all of it, and you will find it under so many heads that it would take you quite ten or fifteen minutes to read through and find out whether there is an "hours-of-labor" law or not. On the other hand, purely technical matters, such as "*Abatement*," are usually well indexed, because their names are what we call "terms of art," under which any lawyer would look.

But, after all, it does not so much matter what system

we adopt as long as it is the same system. At present I know of nothing better than the forty heads contained in the "Principal Headings" of the New York State Library Index, though I should like to change the names of a few. For instance, "Combinations or Monopolies" is not the head to which the lawyer would naturally look for statutes against Trusts. The word "trust" has become a term of art. If not put under "Trusts" it should be under "Restraint of trade" or "Monopolies," but the word "combination" is neither old nor new, legal nor popular. A combination is lawful. If unlawful, it is *not* a combination, but a conspiracy.

The most important statute of the United States is perhaps the most horrible example of slovenliness, bad form, and contradiction of all. The "Hepburn Act" is the amended Interstate Commerce Act, and is printed by Congress in a pamphlet incorporating with it quite a different act known as the Elkins Act, besides the Safety Appliance Act, the Arbitration Act, and several others. We all remember under what political stress this legislation was passed, with Congress balking, the senators going one way, the attorney-general another, the radical congressmen in front, and the president pushing them all. It is easily intelligible that such a condition of things should not tend to lucid legislation, particularly when an opposing minority do not desire the legislation at all, and hope to leave it in such a shape as to be contradictory, or unconstitutional—or both. (This has been intentionally done more than once.) All of it a mass of contradictions or overlaying amendments, the first important part of it which came under the scrutiny of the Supreme Court only escaped being held unconstitutional by being emasculated. Its other clauses have yet to face that dreaded scrutiny. Its basic principle has yet to be declared constitutional, while the only principle which has proved of any value was law already. This wonderful product of compromise starts off by saying "Be it enacted, etc., Section 1 as amended

June 29, 1906." It begins with an amendment to itself. It does not tell you how much of the prior law was repealed, except upon a careful scrutiny which only paid lawyers were willing to give. Upon the old Interstate Commerce Act of 1887, after quoting it substantially in full, it adds a mass of other provisions, some of which are *in pari materia*, some not; some contradictory and some mere repetitions. It amends acts by later acts and, before they have gone into effect, wipes them out by substitutions. It hitches on extraneous matters and it amends past legislation by mere inference. Like a hornet it stings in the end, where revolutionary changes are introduced by altering or adding a word or two in sections a page long, and it ends with the cheerful but too usual statement that "all laws and parts of laws in conflict with provisions of this act are hereby repealed." As a result no one can honestly say he is sure he understands it, any more than any serious lawyer can be certain that its important provisions are any one of them constitutional. And that huge statute with sections numbered 1, 2, 5, 16, 16*a*, etc., with amendments added and substituted, amended and unamended, is contained in twenty-seven closely printed pages. I venture to assert boldly that any competent lawyer who is also a good parliamentary draftsman could put those twenty-seven pages of obscurity into four pages, at most, of lucidity, with two days' honest work. By how little wisdom the world is governed! And how little the representatives of the people care for the litigation or trouble or expense that their own slovenliness causes the people! For the necessity of political compromise is no excuse for this.

I therefore urged before the National Association of State Libraries, at their annual meeting of 1909, that they should use their influence with the various State governments at least—"1, that all revisions be authenticated, authorized, and published by the State; 2, that the annual laws be separated, public from private, and be printed by numbered chapters arranged either chronologically or topically; 3,

that the indexes be arranged under the forty general heads used by the New York State Library in its annual digest, with such additional heads as may, perhaps, prove necessary in some States, such as, for instance, Louisiana, which has subjects and titles of jurisprudence not known to the ordinary common-law States; 4, that the constitutions be printed with the laws; 5, that every State, under a law, employ a permanent, paid parliamentary or legislative draftsman whose duty it shall be to recast, at least in matters of style and arrangement, all acts before they are passed to be engrossed.

Any private member introducing a bill can, of course, avail himself of the draftsman's services before the bill is originally drawn. His advice may be required by the legislature or by legislative committees on the question whether the proposed legislation is necessary, that is to say, whether it is not covered by laws previously existing. It shall be his duty then to edit the laws, arrange them for publication, and to authenticate by his signature the volumes of the annual laws. One person is better than two or three for such work, but he should be paid a very large salary so that he can afford to make it his life work. He should be appointed for a very long term and should have ample clerical assistance. It should also be his duty to correspond and exchange information with similar officials in other States. In other words, he with his assistants should be the legislative reference department. These recommendations were duly referred to the Committee on Uniformity in preparation of session laws.

. . . . . .

At some risk of wearying the reader I have attempted superficially to cover a very extensive field. I started with quoting Blackstone's remark that there is no other science in which so little education is supposed to be necessary as that of legislation. These words were penned by him more than one hundred and fifty years ago and there is still no

book upon this subject; the books on Government, Parliamentary Law, and Hermeneutics concerning respectively the source, the procedure, and the interpretation of legislation, not the content thereof. I can but hope to have called attention to the immense importance of this subject, particularly in our representative democracy, and I will beg my readers who have been patient with me to the end to reflect for more than a moment on the extraordinarily novel state of things that this modern notion of the legislative function brings about. It is a commonplace of historical writers to open their first chapter by calling attention to the difference made by steel and electricity, to the fact that it took longer to get from Boston to Washington in 1776 than it does to-day from Maine to California and back; that it took longer even for the rural legislator in the Connecticut Valley to get to his State Capitol than it does to-day to go from there to Washington. But no one, I think, has ever called attention to the enormous differences in living, in business, in political temper between the days (which practically lasted until the last century) when a citizen, a merchant, an employer of labor, or a laboring man, still more a corporation or association, and lastly, a man even in his most intimate relations, the husband and the father, well knew the law as *familiar* law, a law with which he had grown up, and to which he had adapted his life, his marriage, the education of his children, his business career and his entrance into public life—and these days of to-day, when all those doing business under a corporate firm primarily, but also those doing business at all; all owners of property, all employers of labor, all bankers or manufacturers or consumers; all citizens, in their gravest and their least actions, also must look into their newspapers every morning to make sure that the whole law of life has not been changed for them by a statute passed overnight; when not only no lawyer may maintain an office without the most recent day-by-day bulletins on

legislation, but may not advise on the simplest proposition of marriage or divorce, of a wife's share in a husband's property, of her freedom of contract, without sending not only to his own State legislature, but for the most recent statute of any other State which may have a bearing on the situation. Moreover, these statutes, which at any moment may revolutionize a man's liberty or his property, are not as they were in old times—a mere codification, or attempt at the best expression of a law already existing and well "understanded of the people"; but may and probably will represent a complete reversal of experience, an absolute alteration of human relations, a paradox of all that has gone before; and even when they endeavor not to do so, as in the case of that Massachusetts statute above referred to, their authors' lack of education in the science of legislation may unintentionally cause a revolution in the law. And even when a statute does not do this, no lawyer can be certain what it means until, years or decades afterward, it has received recognition from an authoritative court. That is why much complaint has been made of lawyers; they are said not to know their business, not to be able to tell what the law is. The head of a great railroad has recently complained that he was only anxious to obey the law, but had great difficulty in finding out what the law was. Any good lawyer with common sense knows the common law and usage of the people; but no one could tell at the time of its passage what, for instance, the Sherman Act, enacted twenty-three years ago, meant; the twenty-three years have elapsed; the anti-trust law has been before the courts a thousand times, and the best lawyers in the country do not to-day know what it means; and the highest tribunal in the land is so uncertain on the subject that it has ordered the Standard Oil case reargued.

This is not to say that one must not recognize the meaning and the need of law-making by statute; of law made by the people themselves to suit present conditions. "There should

be a law about it," is the popular phrase—commonly there *is* a law about it, and the best of all law, because tested by time and experience; only, the people do not realize this, and their power and practice of immediate legislation is not only the great event in our modern science of government, but it is also the greatest change in the rules and conditions of our *living*, and our *doing*, and our *having*. Not only our office-holders, but we ourselves, are born, labor, inherit, possess, marry, devise, and combine, under a perpetual plebiscitum, referendum, and recall. I can only hope that I have made some suggestions to my readers which will awaken their interest to the importance of the subject.

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